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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policies and Rules Concerning Children's Television Programming	**MM Docket No. 90-570**
Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations	**MM Docket No. 83-670**[1]

NOTICE OF PROPOSED RULE MAKING

Adopted: November 8, 1990; Released: November 30, 1990

By the Commission:

INTRODUCTION

1. On October 18, 1990, the Children's Television Act of 1990, Pub. L. No. 101-437 (Act), was enacted. Title I of the Act imposes three requirements.[2] First, commercial television broadcast licensees and cable operators must limit the amount of advertising in children's programs. Second, in its review of television broadcast renewal applications, the Commission must consider whether the licensee has complied with the commercialization limits (if a commercial station) and has served "the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs." [3] Finally, the Act requires that the Commission (1) complete a pending proceeding, MM Docket No. 83-670,[4] which includes the issue of how to define and treat "program length commercials," and (2) conduct a rule making to prescribe standards implementing the statutorily-mandated commercialization limits on children's programming.[5] In light of the mandate of the Children's Television Act, we are initiating the instant proceeding and consolidating it with MM Docket No. 83-670.

COMMERCIALIZATION LIMITS

2. Section 102 of the Children's Television Act provides that "each commercial television broadcast licensee,"[6] including for purposes of this section a "cable operator," shall limit the duration of advertising in children's programming to "not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays."[7] Although the numerical limits which the statute prescribes are straightforward, the type of programming to which they apply, *i.e.*, "children's" programming, is not defined. Both the House and Senate committee reports on the legislation refer to a definition used in a former version of our license renewal form: "programs originally produced and broadcast primarily for an audience of children 12 years old and under."[8] This definition specifically excludes programs originally produced for a general audience that might nevertheless be significantly viewed by children. Because a chief purpose of commercial limits is to minimize the danger that children will confuse program and commercial content, and because younger children are particularly susceptible to such confusion,[9] applying these limits to programs designed for younger children, *i.e.*, the 12 and under audience, seems appropriate and consistent with Congressional intent. We seek comment on this tentative conclusion.

3. The statute itself is also silent on how to define "commercial matter." We believe that the intent of the statute is to define "commercial matter" in terms of common parlance, *i.e.*, as air time sold for purposes of selling a product. This is essentially the definition contained in former FCC Form 303 of "commercial matter," which includes "commercial continuity (advertising message of a program sponsor)" and "commercial announcements (any other advertising message for which a charge is made, or other consideration received)."[10] We seek comment on our proposed definition of "commercial matter". We also propose to define "program" in the manner suggested by the the legislative history,[11] as an identifiable unit of program material which is not an announcement.[12] We seek comment on this proposal.

4. The commercial limits apply to commercial television stations, as well as to "cable operators" as defined in Section 602 of the Cable Communications Policy Act of 1984, as amended.[13] Section 602 defines a "cable operator" as

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.[14]

The legislative history suggests that if a cable operator merely passively transmits a commercial television broadcast station, the cable operator would not be independently liable for violations of the Act committed by the broadcast station.[15] In this instance, the cable operator would presumably be entitled to rely on the commercial broadcaster's compliance with the Children's Television Act. In addition, while no mention is included in this legislation regarding cable access channels, Section 611 (e) of the Cable Communications Policy Act of 1984 specifically provides, subject to certain exemptions for obscenity or speech "otherwise unprotected by the Constitution," that a cable operator "shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section".[16] Reading the Children's Television Act consistently with the 1984 legislation, we would propose not to hold cable operators liable for commercial limit violations that may occur on access channels. Thus, cable operators would not be responsible for ensuring compliance with the limits either on the commercial television stations or on the access channels they carry. We propose, however, to hold cable operators responsible for ensuring that the commercial limits are not exceeded in children's programming

carried on any channel locally originated by the operator. We seek comment on these tentative conclusions. Because neither the Act nor its legislative history would appear to intend to hold cable operators responsible for violations of the commercial limits on the part of cable network programs, such as those on Nickelodeon or the Discovery Channel, we seek comment on the legal authority we would have to hold the cable network programmer directly liable for cable network program violations. We also seek comment on the means by which we might obtain information on violations of the Act committed on a cable system.

5. Under the general forfeiture provisions of the Communications Act,[17] both television broadcast and cable operators are equally subject to forfeitures for violations of the Communications Act and Commission Rules. In addition, the Children's Television Act makes compliance with the commercialization rules an item for review in television broadcast license renewals. The legislative history indicates that we should follow traditional practices in enforcing the commercial limits. These practices include an "allowance . . . for situations where the violation of commercial time limits is *de minimis*. "[18] We believe that it would be consistent with the general intent of Congress to tailor the penalties for violation of commercialization standards to the magnitude of the violation. Thus, we propose to impose forfeitures on both cable and broadcast operators that exceed the commercial limits in more than a *de minimis* fashion. For continuing or otherwise egregious violations of these rules, television broadcast licensees would lose their renewal expectancy and their license renewal applications would be set for hearing. We ask interested parties to comment on this proposal. We also seek comment on whether we should permit commercial television broadcasters to certify compliance with the commercial limits in their renewal applications. Under this approach, only if the renewal applicant were unable to so certify would we require as an appendix to the renewal form a specific explanation of cases where the limits were exceeded. Finally, we seek comment on whether it would be necessary for us to impose any record-keeping requirements with respect to commercial limits in order to facilitate review of a licensee's compliance with those limits.

PROGRAMMING REQUIREMENTS

6. The Children's Television Act requires that, in reviewing television license renewal applications,[19] we consider whether the licensee has served "the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs."[20] The statute provides that we may also consider (1) "any special nonbroadcast efforts . . . which enhance the educational and informational value of such programming" and (2) any "special effort" to produce or support programming broadcast by another station in the licensee's market that is "specifically designed to serve the educational and informational needs of children."[21]

7. The pertinent section of the Act[22] is silent on how the term "children" should be defined when the Commission is considering whether broadcasters have provided programming specifically designed to serve the educational and informational needs of children. In the Section of the Act that establishes the National Endowment for Children's Educational Television, however, "educational programming for children" is defined as material "directed to an audience of children who are 16 years of age or younger."[23] With respect to commercial television stations, the Commission historically has defined children's programming as material "originally produced and broadcast primarily for a child audience twelve years old and under."[24] Within this category, the Commission has recognized "at least two distinct audiences, preschoolers (ages two to five) and school-age children (ages six to twelve)."[25] We also note that in our administrative interpretation of the 24-hour statutory ban on indecent broadcasts, -- another proceeding in which the Commission has sought to safeguard children's interests -- we adopted a broader view of children as those 17 years of age and under.[26] We invite comment on whether the Commission should adopt the same definition of "children" that we propose for commercialization limits, or if we should use some other definition. Parties are also invited to comment on whether the Act requres broadcasters to target their programs to particular segments of the child audience,[27] whether such targeting is feasible, and how such segments might be defined.

8. We propose to require each licensee to assess the needs of children given (1) the circumstances within the community, (2) other programming on the station, (3) programming aired on other broadcast stations within the community, and (4) other programs for children available in the broadcaster's community of license. Each licensee should then air programs intended to meet the "educational and informational needs of children" responding to its assessment.[28] We seek comment on this proposal. As the courts have suggested, we wish to avoid any de facto system of "precensorship" and leave to the licensee to "interpret the program categories in good faith."[29] In the event that commenters believe we should attempt to define for broadcasters the parameters of the Act's children's programming requirement, they should address what definition of "educational and informational" programming we might use.[30]

9. It is clear that Congress intended to require broadcasters to keep records concerning the children's programming they carry.[31] The legislative history makes clear, however, that Congress also intended to afford broadcasters some flexibility regarding the manner in which those records can be kept. For example, both the Senate and House Reports state that broadcasters have the discretion to include reports on children's educational and informational programming in the quarterly issues list they presently are required to maintain in their public file, or to maintain separate children's programming files.[32] The sole limitation is that whatever records are kept should include a description of the children's programming provided, including the time, date and duration of the programming.[33]

10. We propose to require broadcasters to maintain records sufficient for us to determine at renewal time whether the broadcaster has served the educational and informational needs of children as provided in the Act. We further propose to leave to the broadcaster's judgment the form (*i.e.*, issues/programs list, separate children's programming list, or some equivalent alternative record) in which it will maintain such records. At a minimum, however, the records should include a description of the programming, as well as its time, date and duration.[34] We also propose that the broadcasters make their children's

programming records part of the station's public inspection file. In addition, the committee reports in the Act's legislative history state that "Broadcasters must . . . send their children's television lists contained in the public files to the FCC at the time the Commission is considering their license for renewal."[35] Both reports indicate their view that this requirement differs from that applied to "all other community issue-oriented programming" and state that this is their "explicit intent".[36] In light of the apparent intent of Congress, we propose that broadcasters be required to submit their records of children's programming with their license renewal applications. We seek comment on these proposals, and on any modifications to them which, consistent with the Act, would facilitate administrative review of license renewals. However, in light of the administrative complexity involved in processing each broadcaster's records of children's programming at renewal time, we seek comment on whether submission of such records with a renewal application is indeed mandated by the Act. We ask interested parties to comment on whether, consistent with the legislative history, we might permit a broadcaster under our current short-form renewal procedure, to certify that it was in compliance with our rules governing programming to serve the "educational and informational needs of children". We also seek comment on whether our policy with respect to remedies for television broadcasters' failure to meet the educational and informational needs of children should be analogous to that which we propose for commercialization limits.[37]

11. In addition, we seek comment on what the effective date of our implementing rules with regard to renewal applications should be. One approach might be that any applications for renewal filed after the new commercialization and children's programming rules and policies are in effect, must demonstrate compliance with such rules and policies since the time they are effective, however brief a period that may be. This approach comports with the language of the statute requiring review for compliance "[a]fter the standards required by Section 102 [the commercial limits] are in effect".[38] We seek comment on this proposal.

12. We note, however, that the legislative history suggests that Congress may have intended to afford licensees a longer period of notice with respect to the children's programing requirements. One Senator, speaking in July 1990, stated that "the committee expects licensees to be in compliance with the commercial time limits and the programming standard set forth in title I by September 1991".[39] The legislation, however, did not actually pass the Congress until October 1990. The Senate Report indicates that Congress intended for licensees to be in compliance with the programming standards one year from date of enactment.[40] We therefore request comment on whether we should require renewal applicants to demonstrate compliance with the Act's programming requirements within one year of enactment -- as of October 1991. We also seek comment on whether we should allow a similar notice period for implementation of commercial limits.

"PROGRAM-LENGTH COMMERCIALS"

13. The Children's Television Act requires that we complete MM Docket No. 83-670 in 180 days. That docket concerns (1) the appropriate commercial levels in children's programming,[41] an issue now superseded by the Act; and (2) the propriety of product-related programs, including those using interactive toys. We now (1) in light of the Children's Television Act, dismiss as moot that portion of the proceeding relating to commercial limits and (2) seek further comment on the issue of product-related programs.[42]

14. Petitions filed by Action for Children's Television (ACT) in 1986 and 1987 contend that certain product-related programs are "program-length commercials" that contravene the public interest.[43] Because toys can be associated with highly acclaimed children's shows such as "Sesame Street" and Disney programs, the *FurtherNotice* questioned whether "program length commercials" logically could be defined so as not to inhibit such programs.[44] Some commenters who responded to the *Further Notice* would draw a distinction between two types of product-related children's shows. The first type consists of programs that precede the product by a period of time, and the related products are not advertised on television. With the second type, a toy is created before or simultaneously to the show, and the related products are advertised on television. These commenters would classify the former as programming and the latter as commercial matter.[45] We question, however, whether this is a viable distinction. NAB, for example, notes that programs such as "Charlie Brown" and "Superman" became television shows after related products appeared.[46] Other commenters suggest that the intent of the producer should also be a factor in distinguishing program and commercial matter.[47] We believe that determinations of such intent would be difficult if not impossible.

15. As we previously stated, we propose to define "commercial matter" according to its plain meaning, *i.e.*, as air time sold for purposes of selling a product.[48] We therefore propose to define "program-length commercial" in the context of children's programming as a program associated with a product in which commercials for that product are aired. We traditionally have defined "program-length commercial" as a program segment "so interwoven with, and in essence auxiliary to the sponsor's advertising . . . that the entire program constitutes a single commercial promotion for the sponsor's products or services."[49] We believe that our proposed definition appropriately applies this traditional test to children's programming. We observe that programs that have story lines revolving around characters that are also toys would not automatically fit within our proposed definition. We seek comment on the utility of our proposed definition and on how we might refine it further for children's programming. We are particularly interested in any modifications that would encourage certainty in application of the definition. We also seek comment on our tentative conclusion that any children's program that was found to be a "program-length commercial" would count toward the statutory commercial limits.[50] We also seek comment on whether and how application of the proposed definition or any other definition of "program length commercial" would apply to existing programs.

16. It appears that, since the issuance of the *Further Notice*, interactive toys have not been used with children's programs. We seek comment on whether this impression

is accurate and on whether there are any children's programs in which such toys are being used. Assuming we are correct in this conclusion, there appears to be no need for further consideration of regulations relating to "interactive" toy programs. If, however, such toys are being used, we seek comment on whether any Commission action (and if so, what) is appropriate[51] or necessary.

17. The *Further Notice* deferred decision on ACT's requests that we require sponsorship identification announcements to be interspersed throughout programs involving interactive toys and program-length commercials.[52] The *Further Notice* stated that the issue would be taken up in a pending proceeding involving sponsorship identification.[53] In that proceeding, we further deferred the issue.[54] We now seek comment on when licensees should have a Section 317 or other binding obligation[55] to air sponsorship identification announcements in product-related programs, either in the form that ACT requests or in some other manner. ACT claims that without such a format, children will be deceived as to the alleged commercial content of the program.[56] Also, we invite comment on whether the particular technique suggested by ACT, that of interspersing announcements, would adequately apprise a child audience of the content of a program. In this regard, we seek comment on ACT's subsequent statement that "a sponsorship announcement to a child audience would clearly not be effective in informing a *child* audience that it is being persuaded."[57]

CONCLUSION

18. We seek comment on three aspects of children's programming addressed in the the Children's Television Act of 1990: advertising limits, educational and informational programming, and "program-length commercials". We are particularly interested in proposals that will yield unambiguous rules fulfilling the objectives of the Act, yet minimizing the burdens on the broadcasting and cable industry that are necessary to comply with the Act.

EX PARTE CONSIDERATIONS

19. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 CFR § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda, and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 CFR § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 CFR § 1.1203.

20. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 CFR § 1.1202(b). Any person who makes or submits a written *ex parte* presentation must provide, on the same day it is submitted, two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary and must be labeled or captioned as an *ex parte* presentation.

21. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide, on the day of the oral presentation, an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 CFR § 1.1206.

COMMENT INFORMATION

22. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before January 30, 1991, and reply comments on or before February 20, 1991. Extensions of these time periods are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. One additional copy shall be filed at the offices of International Transcription Service (ITS), 1919 M Street, Room 246, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

I. Reason for the Action:

23. The action is taken in response to a Congressional mandate contained in the Children's Television Act of 1990, which directs this Commission, within 30 days of enactment, to initiate a rule making to prescribe standards with respect to commercialization limits on children's programming. It further directs that the Commission, (1) in reviewing a television broadcast license renewal application, consider the licensee's compliance with such standards and with the Act's requirement that licensees serve the educational and informational needs of children; and (2) complete pending MM Docket No. 83-670.

II. Objective of this Action:

24. This proceeding is intended to satisfy our duties under the Children's Television Act of 1990 and to compile a comprehensive record on which to base a decision as to how best to effectuate our obligations to review compliance with the Act's commercializaton limits and educational and informational programming requirements for children.

III. Legal Basis:

25. Authority for this action may be found in Sections 4, 303, 317 and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, 317 and 503, as well as the Children's Television Act of 1990, Pub. L. No. 101-437.

IV. Number and Type of Small Entities Affected by the Proposed Rule:

26. Approximately 1,112 commercial television stations would be affected by the proposed rules, in addition to cable operators, program sponsors and potential sponsors, program producers and suppliers, and possibly, non-commercial television stations.

V. Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule:

27. As prescribed by the Act, commercial limitations would be placed on commercial television and cable programming for children, and the Commission would be required to review television broadcast license renewal applications for compliance with these rules, as well as the licensee's service meeting the educational and informational needs of children. The Commission proposes to monitor compliance with the commercial limitations by having commercial television broadcasters certify their compliance on their renewal applications. The Act allows licensees flexibility in fulfilling their children's programming obligations. With respect to children's programming, we propose that television broadcasters retain in their public inspection files, and file with their renewal applications, a description of children's programs, including time, date and duration, either as part of their issues-programs list, as a separate children's programs list, or in some other, equivalent format.

VI. Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:

28. None.

VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action:

29. This *Notice of Proposed Rule Making* seeks to implement the directives of the Children's Television Act of 1990 with a minimal amount of burden on licensees. Comment is requested on various approaches.

30. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.*, (1981)).

PAPERWORK REDUCTION ACT STATEMENT

31. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980, and found, if adopted, to impose new or modified information collection requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

AUTHORITY CITATION

32. Authority for the actions proposed above is contained in Sections 4 (i), 4 (j), 303 (r), 317 and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154 (j), 303(r), 317 and 503, and in the Children's Television Act of 1990, Pub. L. No. 101-437.

33. Further information on this proceeding may be obtained by contacting Regina Harrison, Mass Media Bureau at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

P.L. 101-437
approved 10/18/90
[H.R. 1677]

Section 1. This Act may be cited as the "Children's Television Act of 1990".

TITLE I -- REGULATION OF CHILDREN'S TELEVISION
FINDINGS

SEC. 101. The Congress finds that--

(1) it has been clearly demonstrated that television can assist children to learn important information, skills, values, and behavior, while entertaining them and exciting their curiosity to learn about the world around them;

(2) as part of their obligation to serve the public interest, television station operators and licensees should provide programming that serves the special needs of children;

(3) the financial support of advertisers assists in the provision of programming to children;

(4) special safeguards are appropriate to protect children from overcommercialization on television;

(5) television station operators and licensees should follow practices in connection with children's television programming and advertising that take into consideration the characteristics of this child audience; and

(6) it is therefore necessary that the Federal Communications Commission (hereinafter referred to as the "Commission") take the actions required by this title.

STANDARDS FOR CHILDREN'S TELEVISION PROGRAMMING

SEC. 102. (a) The Commission shall, within 30 days after the date of enactment of this Act, initiate a Rule Making proceeding to prescribe standards applicable to commercial television broadcast licensees with respect to the time devoted to commercial matter in conjunction with children's television programming. The Commission shall, within 180 days after the date of enactment of this Act, complete the Rule Making proceeding and prescribe final standards that meet the requirements of subsection (b).

(b) Except as provided in subsection (c), the standards prescribed under subsection (a) shall include the requirement that each commercial television broadcast licensee shall limit the duration of advertising in children's television programming to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays.

(c) After January 1, 1993, the Commission--

(1) may review and evaluate the advertising duration limitations required by subsection (b); and

(2) may, after notice and public comment and a demonstration of the need for modification of such limitations, modify such limitations in accordance with the public interest.

(d) As used in this section, the term "commercial television broadcast licensee" includes a cable operator, as defined in section 602 of the Communications Act of 1934 (47 U.S.C. 522).

CONSIDERATION OF CHILDREN'S TELEVISION SERVICE IN BROADCAST LICENSE RENEWAL

SEC. 103. (a) After the standards required by section 102 are in effect, the Commission shall, in its review of any application for renewal of a television broadcast license, consider the extent to which the licensee--

(1) has complied with such standards; and

(2) has served the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs.

(b) In addition to consideration of the licensee's programming as required under subsection (a), the Commission may consider --

(1) any special nonbroadcast efforts by the licensee which enhance the educational and informational value of such programming to children; and

(2) any special efforts by the licensee to produce or support programming broadcast by another station in the licensee's marketplace which is specifically designed to serve the educational and informational needs of children.

PROGRAM LENGTH COMMERCIAL MATTER

SEC. 104. Within 180 days after the date of enactment of this Act, the Commission shall complete the proceeding known as "Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations", MM Docket No. 83-670.

FOOTNOTES

[1] Pleadings and comments citing both captioned dockets will be physically filed and recorded as filed in Mass Media Docket 90-570.

[2] The relevant provisions of Title I are attached as Appendix A. Title II of the Act, The National Endowment for Children's Educational Television Act of 1990, establishes an endowment to support children's educational television programming to be administered by the Secretary of Commerce.

[3] Act, § 103(a).

[4] "Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations" in MM Docket No. 83-670. The Act requires that the Commission complete MM Docket No. 83-670 within 180 days of enactment.

[5] The statute requires that such proceeding be initiated within 30 days of enactment and completed within 180 days of enactment.

[6] According to the legislative history, the Act does not apply to licensees of low power television stations. *See* 136 Cong. Rec. H8537 (daily ed. Oct. 1, 1990)(remarks of Rep. Edward Markey).

[7] After January 1, 1993, the Commission may, after notice and comment and a demonstration of need, modify these limits in accordance with the public interest. *See* Act, § 102(c).

[8] Children's Television Act of 1989, House Committee on Energy and Commerce, H. R. Rep. No. 385, 101st Cong., 1st Sess. 16 (1989) (House Report); Children's Television Act of 1989, Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 227, 101st Cong., 1st Sess. 22 (1989) (Senate Report). *See* FCC Form 303-C, Renewal Application Audit Form for Commercial TV Broadcast Stations, § III.1.B.(iv) (Sept. 1981) (former FCC Form 303).

[9] *See generally* Senate Report at 9.

[10] House Report at 15-16; Senate Report at 21; Former FCC Form 303, § III.1.C; 47 C.F.R. § 73.670 nn 3&4 (1976 ed.) (superseded). Included in the definition of "commercial matter" were "bonus spots"; "trade-out spots"; and promotional announcements (1) on behalf of another commonly controlled broadcast station serving the same community and (2) of a future program where consideration was received for the announcement or where the announcement identified the program sponsor beyond mention of the sponsor's name as an integral part of the program title. Excluded were all other promotional announcements; station identification announcements for which no charge was made; mechanical reproduction

announcements; public service announcements; announcements made pursuant to Section 73.1212(d) of our Rules that materials or services have been furnished as an inducement to broadcast a political program; and announcements involving the local public notice requirements of our Rules (*see, e.g.*, 47 CFR §§ 73.3580). "Public Service Announcement" (PSA) was defined as any announcement for which no charge was made and which promoted programs, activities or services of federal, state, or local governments or of non-profit organizations, and other announcements regarded as serving the community interests (excluding time signals, routine weather announcements, and promotional announcements). We seek comment on whether we should apply the definition of "commercial matter" in this way for purposes of administering the Children's Television Act.

[11] House Report at 16; Senate Report at 21; Former FCC Form 303, § III.3.

[12] We also propose to "count" commercial minutes by program segment and not by the clock hour, so that a program airing at, for example, 9:45 - 10:45 on Saturday morning could carry only 10.5 minutes of commercials and would not be entitled to carry 10.5 minutes for the hour from 9am - 10 am and 10.5 minutes in the hour from 10am - 11am. We seek comment on this proposal.

[13] 47 U.S.C. § 522(4).

[14] "Cable service" and "cable system" are separately defined. 47 U.S.C. § 522(5), (6).

[15] *See generally* 136 Cong. Rec. H8537 (daily ed. Oct. 1, 1990) (remarks of Rep. Edward Markey).

[16] 47 U.S.C. § 531 (e). *See also* Section 612 (c)(2); 47 U.S.C. § 532 (c)(2).

[17] 47 U.S.C. § 503.

[18] House Report at 16.

[19] Section 102 of the Act imposes commercial limits on "commercial" television broadcast stations, while Section 103 mandates that the Commission in its review of "any" television broadcast license renewal application, consider compliance with such standards and whether the licensee has met the educational and informational needs of children. Although the Act's commercial limits would by definition not apply to non-commercial stations, it is unclear whether the Act's programming requirements apply to commercial and non-commercial stations alike. The legislative history is similarly ambiguous. *Compare* Senate Report at 7 (public television produces over 1,200 hours of children's educational programming, while commercial television has "disturbingly little" educational or informational programming) *with* 136 Cong. Rec. H8540 (daily ed. Oct. 1, 1990) (remarks of Rep. Cooper)(specifying that Act applies to "any" broadcaster, including home shopping stations). We seek comment on the issue of whether Congress intended that the Act's educational and informational programming requirements apply to both commercial and non-commercial stations.

[20] Act, § 103(a).

[21] Act, § 103(b). Senator Inouye elaborated on the broad range of programming that can meet the standards set out in the Act:

> "[G]eneral purpose programming . . . can have an informative and educational impact. . . . This is particularly true where special nonbroadcast efforts are undertaken in connection with a licensee's programming to enhance the educational or informational value of such programming to children. . . . Such efforts might include, for example, the distribution of study guides or reading scripts prior to the broadcast of a program.
>
> [L]icensees can serve the educational and informational needs of children by producing or supporting programming which is specifically designed to meet those needs and is intended for broadcast by other -- primarily public -- stations. . . .
>
> The Commission would, of course, expect that each station will itself broadcast some programming specifically designed for children to serve their educational and information needs. . . ."
>
> 136 Cong. Rec. S10122 (daily ed. July 19, 1990) (remarks of Sen. Inouye). Further, according to Senator Burns, "Stations will be able to take into account what other children's programming is available in their community in determining their own programming mix." 136 Cong. Rec. S10275 (daily ed. July 23, 1990) (remarks of Sen. Burns).

[22] Act, § 103.

[23] Act, § 394(i)(1). This Section amends provisions of the Communications Act relating to financial assistance for public telecommunications facilities. Funding guidelines for public stations traditionally have defined the term "children" more broadly in recognition of the fact that grantmaking agencies as a general practice target funds for programming directed at specific age categories. *See, e.g., Television Programming for Children : A Report of the Children's Television Task Force*, Vol. 5 at 26-29 (1979)(" *Task Force Report* ").

[24] *Children's Television Programming and Advertising Practices*, 96 FCC 2d 634, 646-47 (1984), *aff'd sub nom. Action for Children's Television v. FCC*, 756 F. 2d 899 (D.C. Cir. 1985); *Children's Television Programming and Advertising Practices (Notice of Proposed Rule Making)*, 75 FCC 2d 138, 142, 144 (1979); *Task Force Report*, Vol. 1 at 12 n. 18. *Memorandum Opinion and Order*, 58 FCC 2d 1169 (1975) (amendments to instructions for renewal form); *Memorandum Opinion and Order*, 53 FCC 2d 161, 162 (1975)(amendments to broadcast renewal form). The Commission also has used this definition in regulations not promulgated primarily to deal with children's programming issues. *See, e.g.*, 47 CFR § 73.658(k) (the "prime time access rule"), Note 2.

[25] *Children's Television Programming and Advertising Practices*, 75 FCC 2d at 144; *Task Force Report*, Vol. 1 at 23-27.

[26] *See generally* Pub.L. No. 100-459, § 608, 102 Stat. 2186 at 2228 (1988), *implemented at* 47 CFR § 73.3999 (1989); *see Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. ' 1464*, 4 FCC Rcd 457 (1988), *appeal pending sub nom. Action for Children's Television v. FCC*, No. 88-1916 (D.C. Cir. pet. filed dec. 30, 1988). Upon remand of the record, the Commission explained its reasoning for defining "children" for purposes of Section 608 of Pub. L. No. 100-459 in *Report of the Commission, Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. ' 1464*, 5 FCC Rcd 5297, 5301 (1990) (*Indecency Report*).

[27] *See generally* 136 Cong. Rec. S10122 (daily ed. July 19, 1990) (remarks of Sen. Daniel Inouye); House Report at 17 ("licensee must demonstrate that it has served the child audience with programming which is designed to meet their unique educational and informational needs, taking into account the special characteristics of various segments of the child population.")

[28] The legislative history of the Act is replete with statements that Congress intended to afford licensees maximum discretion in fulfilling this requirement. For example, the committee reports state that the programming mix that can meet this requirement is left to the broadcaster's discretion. House Report at 17; Senate Report at 23. *See also* 136 Cong. Rec. S10121 (daily ed. July 19, 1990) (remarks of Sen. Daniel Inouye)("[w]e have

left the licensee the greatest possible flexibility in how it discharges its public service obligation to children.") Both committee reports also specifically reject quantitative standards. House Report at 17; Senate Report at 23.

[29] *National Association of Independent Television Producers and Distributors v. FCC*, 516 F.2d 526, 540 (2d Cir. 1975).

[30] For example, one option might be to define "educational and informational" programming as programming which furthers a child's intellectual, emotional and social development. *See generally* 136 Cong. Rec. S10122 (July 19, 1990) (remarks of Sen. Inouye). Alternatively, our former rule on program log requirements contained a definition of "instructional" programming as including that which furthers an understanding of literature, music, fine arts, history, geography, natural and social sciences. *See* 47 CFR. § 73.670 n. 1 (f) (1976 ed.) (superseded). "Educational and informational programming" might include this category of programs, as well as other categories, including, for example, health-related and children's news programs. Commenters supporting programming definitions should address these approaches and any alternatives that may be consistent with the Act.

[31] *See, e.g.*, House Report at 17-18; Senate Report at 23.

[32] House Report at 18; Senate Report at 23.

[33] *Id.*

[34] Thus, based on examples taken from the legislative history, a licensee might describe a program such as The Smurfs or Pee Wee's Playhouse, together with the times and dates it aired, and program duration. *See* Senate Report at 7-8.

[35] House Report at 8. *See also* Senate Report at 23-24.

[36] House Report at 18; Senate Report at 24.

[37] We note that broadcasters also have the obligation to safeguard children's interests by complying with the statutory prohibition on the broadcast of indecent material. *See* 18 U.S.C. § 1464; *Indecency Report*, *supra* note 26. As with the enforcement scheme we contemplate here, *see* ¶¶ 5, 10, we generally enforce that statute by assessing forfeitures. However, again consistent with the enforcement scheme proposed here, a pattern of repeated violations will also be considered in our review of the licensee's renewal application in determining whether the licensee has served the public interest.

[38] Act, § 103(a).

[39] 136 Cong. Rec. S10122 (daily ed. July 19, 1990) (remarks of Sen. Inouye).

[40] Senate Report at 24.

[41] The *Further Notice of Proposed Rule Making/Notice of Inquiry*, 2 FCC Rcd 6822 (1987) (*Further Notice*) reopened that issue after an appellate court remand in *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987), *aff'g in part and remanding in part, Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Televison Stations*, 98 FCC 2d 1076 (1984), *on reconsideration*, 104 FCC 2d 358 (*Reconsideration Order*) (1986).

[42] We also incorporate the entire record in MM Docket No. 83-670 into this consolidated proceeding.

[43] The product-related program issues were raised by two ACT petitions, filed February 9, 1987 (ACT Interactive Toy Petition) and October 5, 1987 (ACT Product-Related Programs Petition). *See also* ACT Petition for Declaratory Ruling or Investigation (dated Jan. 17, 1986) (ACT 1986 Petition) (appended to the ACT Interactive Toy Petition and to ACT Product-Related Programs Petition).

[44] 2 FCC Rcd at 6825.

[45] *See, e.g.*, Comments of Telecommunications Research and Action Center at 22 (Feb. 22, 1988); ACT 1986 Petition, *supra* note 43 at 5-6.

[46] Comments of National Association of Broadcasters (Feb. 18, 1988) at 30. We also question whether there is a rational basis for distinguishing programs related to toys which are advertised on television and those related to toys which are advertised in other media.

[47] Comments of American Academy of Child and Adolescent Psychiatry at 3 (Feb. 18, 1988).

[48] *See supra*, para. 3.

[49] *Applicability of Commission Policies on Program-Length Commercials*, 44 FCC 2d 985, 986 (1974); *ACT v. KTTV*, 58 RR 2d 61, 66 & n.16 (1985), *rev'd on other grounds, National Association for Better Broadcasting v. FCC*, 830 F.2d 270 (D.C. Cir. 1987) (*NABB v. FCC*), *on remand National Association for Better Broadcasting v. Television Station KCOP (TV)*, 4 FCC Rcd 4988 (1989) (*NABB Remand*), *aff'd sub nom., National Association for Better Broadcasting v. FCC*, 902 F.2d 1009 (D.C. Cir. 1990) (per curiam).

[50] In the case of a children's "program-length commercial" that fell within the commercialization limits, *i.e.*, that was under 10.5 minutes in length, would we need to establish a separate rule or policy prohibiting such programs?

[51] We seek comment on whether previous opinions issued by the Mass Media Bureau finding that interactive systems used in children's programs "would not appear to conflict with any of the Commission's broadcast rules or policies" remain valid. *See e.g.*, Letter to Wiley, Rein & Fielding from James C. McKinney, Chief, Mass Media Bureau (Oct. 30, 1986) (*1986 Bureau Letter*). The *1986 Bureau Letter* found that a video system that activated remote objects such as toys from television broadcasts did not appear to contravene Commission rules. The Bureau stated that it had previously permitted interactive systems that integrated aural activating signals into the program's storyline. The Bureau explained that tones used by these systems were integrated into normal program audio such that they were an integral and indistinguishable part of the primary television service, and therefore, intended for use by all viewers. Thus, there was no bar to such tones also serving a secondary purpose. The Bureau stated that "[i]nasmuch as we have found that the use of these audio systems are acceptable under the Commission's rules, we could, therefore, approve the use of video systems where the coded information was integrated into the storyline." *1986 Bureau Letter* at 1.

[52] 2 FCC Rcd at 6827 n.3.

[53] *NABB Remand*, *supra* note 49.

[54] *NABB Remand*, *supra* note 49, 4 FCC Rcd at 4992 n. 11.

[55] *See, e.g., Reconsideration Order*, 104 FCC 2d at 371 n.41 (adhering to existing policies requiring that licensees separate program and commercial material and prohibiting host selling).

[56] ACT Interactive Toy Petition at 6.

[57] ACT Product-Related Programs Petition at 4-5 (emphasis in original).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-431

In re Applications of

TALLAHASSEE MINORITY PARTNERS (hereafter "Minority")	File No. BPH-880324MH
FERGUSON COMMUNICATIONS, INC. (hereafter "Ferguson")	File No. BPH-880324MN
DOLPHIN COMMUNICATIONS, LTD. (hereafter "Dolphin")	File No. BPH-880324MR
CAPITAL CITY BROADCAST, INC. (hereafter "Capital")	File No. BPH-880324MW
MOORHEAD/ KIEDROWSKI, LTD. (hereafter "Moorhead")	File No. BPH-880324NE
MARANTHA BROADCASTING COMPANY, INC. (hereafter "Marantha")	File No. BPH-880324NG
WCVC, INC. (hereafter "WCVC")	File No. BPH-880324NI
TALLY RADIO, INC. (hereafter "Tally")	File No. BPH-880324NL
WOMEN'S BROADCASTING CORP. (hereafter "WBC")	File No. BPH-880324NQ
KENNETH B. DARBY (hereafter "Darby")	File No. BPH-880324NX
METRO TALLAHASSEE BROADCASTERS LIMITED PARTNERSHIP (hereafter "Metro")	File No. BPH-880324OA
QUAD COMMUNICATIONS, INC. (hereafter "Quad")	File No. BPH-880324OD
JOHN S. MATTHEWS, JR. (hereafter "Matthews")	File No. BPH-880324OH
J.L.J.B. WIRELESS, INC. (hereafter " Wireless")	File No. BPH-880324OL

For Construction Permit
for a New FM Station on Channel 291A (106.1 MHz)
in Tallahassee, Florida

HEARING DESIGNATION ORDER

Adopted: September 18, 1990; Released: December 3, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Minority*. Henry Hunter and Jerome Swaine are each 20% owners of Uptown Broadcasting, Inc. (Uptown), a corporation with an application pending in Quincy, FL. Each has indicated his intent to terminate his relationship with Uptown in the event of grant of the referenced application. Accordingly, in the event of grant of Minority's application, Hunter and Swaine will each be required to sever all connections with Uptown prior to the commencement of program test authority.

3. Section II, Item 4(4), FCC Form 301, defines the equity interest of each partner in Minority as follows:

Jerome Swaine	40%
James Phillip Jeter	10%
Charles N. Martin	10%
Henry C. Hunter	40%

On June 6, 1989, Minority amended its application. This amendment indicates that Swaine, a 20% general partner of the applicant, is prepared to divest his other ownership interests if Minority's application is granted. Minority fails to account for the discrepancy between Swaine's equity interest and that listed in the original application. Accordingly, Minority will be required to submit an amendment which clarifies the equity interests of each partner, to the presiding Administrative Law Judge within 30 days after this Order is released.

4. *Ferguson*. In response to Section III, FCC Form 301, as to Ferguson's financial qualifications, Ferguson certified that it did not have sufficient funds available to complete construction and operate the requested facilities for three months without revenues. Ferguson noted, however, that it was "currently seeking financing." Subsequently, on November 30, 1988, Ferguson filed an amendment purporting to certify as to finances. Ferguson's application was put on *Public Notice* for acceptance for tender on May 25, 1988, and Ferguson, therefore, had until June 27, 1988, to file amendments as a matter of right. After the close of the amendment as of right period, an applicant cannot file a curative amendment to correct a grantability defect. *See Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985). To accept amendments after the close of the amendment as of right period would be unfair to the other applicants in this proceeding, who fully complied with our acceptability requirements as of the amendment as of right date. *See PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd 4293 (1988); *See also Emmy Hahn Limited Partnership*, 4 FCC Rcd 8336 (1989); *Domega Broadcasting Corporation*, 4 FCC Rcd 1450 (1989). Accordingly, Ferguson's amendment is untimely and will herein be returned. Furthermore, an appropriate issue will be added as to Ferguson's financial qualifications.

5. Ferguson lists in Section V-B, Item 7(a) of the application a ground elevation of 21 meters (70 feet). Data on file with the Commission's Antenna Survey Branch for the tower proposed also lists a ground elevation of 21 meters. The site map, exhibit 4B, indicates a ground elevation of 15 meters (50 feet). Ferguson realizes this discrepancy and states that the tower owner has assured the applicant that no matter what the correct ground elevation is, there is enough space on the tower to insure that the antenna radiation center above mean sea level will remain consistent with what is proposed in the application. However, this discrepancy must be resolved before the application can be granted. Accordingly, an amendment to Ferguson's application curing the above-mentioned discrepancy must be filed with the presiding Administrative Law Judge within 30 days from the date of this Order.

6. *Capital*. Information before the Commission indicates that Capital was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Capital's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Capital in this proceeding.

7. *WCVC*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. WCVC has not completed Item 4 correctly. WCVC's application gives a post office box number as the residence address for Robert and Coreen Cook. Accordingly, WCVC must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

8. On April 30, 1990, WCVC filed a petition for leave to amend, accompanied by an amendment to specify a new transmitter site because the FAA issued a determination that WCVC's original proposal would constitute a hazard to air navigation. An engineering review of WCVC's amendment reveals that the site is short-spaced by 6.4 kilometers to station WTUF(FM), Boston, Georgia. A waiver of 47 C.F.R. Section 73.215 was not requested. Acceptance of that amendment would thus cause the dismissal of WCVC's application. The April 30, 1990 filing is, therefore, a "suicide amendment" and will be returned below pursuant to 47 C.F.R. Section 73.3566(a) and *Golden Shores Broadcasting, Inc.*, 2 FCC Rcd 4743 (1987). WCVC's application will be returned to *status quo ante* and designated for comparative hearing.[1]

9. *WBC*. Terralynn Hoy is sales executive of WTNT in Tallahassee, FL. Ms. Hoy has indicated her intent to terminate her relationship with WTNT in the event of grant of the referenced application. Accordingly, in the event of grant of WBC's application, Ms. Hoy will be required to sever all connections with WTNT prior to the commencement of program test authority.

10. *Metro*. Chester Lee Clear is General Manager, and Jeanette Thomas Clear is an employee of Capital Broadcasting, Inc. (Capital), licensee of stations WWSD-AM and WIQI-FM, in Quincy, Florida. An engineering study re-

veals that Metro's proposed facility in Tallahassee is 100 percent emcompassed within the WIQI-FM 70 dBu contour. Consequently, the proposal may violate the Commission's cross-interest policy. *See, Reexamination of the Commission's Cross-Interest Policy*, 2 FCC Rcd 3699 (1987). (The cross-interest policy essentially prevents individuals or entities from having "meaningful" cross-interests in two broadcast stations serving substantially the same area.) However, Mr. and Mrs. Clear have indicated their intent to terminate their relationship with Capital in the event of grant of the referenced application. Accordingly, in the event of grant of Capital's application, Chester Clear and Jeannette Clear will be required to sever all connections with Capital prior to the commencement of program test authority.

11. *City Coverage*. Ferguson, Dolphin, Moorhead, Tally, Darby, Quad and Matthews have each noted that its application does not provide a 3.16 mV/m signal to the entire proposed city of license as required by Section 73.315(a) of the Commission's Rules. Consequently, each has requested a waiver of Section 73.315(a). The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80 percent of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). Ferguson, Dolphin, Moorhead, Tally, Darby, Quad and Matthews's 3.16 mV/m contours are in substantial compliance with the requirement, in that each covers more than the requisite 80 percent of the principal community. Accordingly, each waiver request will be dismissed as moot.

12. The applicants listed below petitioned for leave to amend their applications after the last day for filing amendments as of right. The subject amendments were accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2);[2] consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Minority	August 26, 1988
Ferguson	December 21, 1988
Dolphin	February 15, 1989
Moorhead	April 26, 1989
Marantha	August 1, 1990
Matthews	May 22, 1989

13. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Minority	May 24, 1989
Dolphin	October 31, 1988; February 10, 1989; February 21, 1990
Moorhead	May 15, 1989
Marantha	December 8, 1988; May 18, 1989; September 19, 1989
Tally	June 28, 1988; January 23, 1989; July 3, 1989
WBC	October 3, 1989

14. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. The FAA has determined that the antenna structures proposed by Quad and WCVC would each constitute a hazard to air navigation. Accordingly, an appropriate issue will be specified and the FAA made a party to this proceeding.

16. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by each of the applicants listed below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

APPLICANTS
Dolphin
Capital
Moorhead
WBC
Metro
Matthews
Wireless

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Ferquson, whether the applicant is financially qualified.

2. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Capital.

3. To determine whether Capital's organizational structure is a sham.

4. To determine, from the evidence adduced pursuant to Issues 2 through 3 above, whether Capital possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine whether there is a reasonable possibility that the tower height and location proposed by each of the following applicant would constitute a hazard to air navigation.

APPLICANTS

Dolphin

Capital

Moorhead

Marantha

WBC

Metro

Matthews

Wireless

Quad

WCVC

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

19. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

20. IT IS FURTHER ORDERED, That the requests for waiver of 47 C.F.R. Section 73.315(a) by Ferguson, Dolphin, Moorhead, Tally, Darby, Quad and Matthews ARE DISMISSED AS MOOT.

21. IT IS FURTHER ORDERED, That, in the event of grant of Minority's application, Henry Hunter and Jerome Swaine will each be ordered to divest himself of all interests in and sever all connections with Uptown Broadcasting, Inc. prior to the commencement of program test authority.

22. IT IS FURTHER ORDERED, That Minority shall submit an amendment which contains the information requested in paragraph 3, above, to the presiding Administrative Law Judge within 30 days after the release of this Order.

23. IT IS FURTHER ORDERED, That Ferguson's November 30, 1988 petition for leave to amend and WCVC's April 30, 1990 petition for leave to amend ARE DENIED and the accompanying amendments ARE HEREBY RETURNED.

24. IT IS FURTHER ORDERED, That Ferguson submit a corrective amendment as required by paragraph 5, above, to the presiding Administrative Law Judge within 30 days after this Order is released.

25. IT IS FURTHER ORDERED, That WCVC shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

26. IT IS FURTHER ORDERED, That, in the event of grant of WBC's application, Terralynn Hoy will divest herself of all interests in and sever all connections with Station WTNT, Tallahassee, FL prior to the commencement of program test authority.

27. IT IS FURTHER ORDERED, That, in the event of grant of Metro's application, Chester Clear and Jeannette Clear will divest themselves of all interests in and sever all connections with Capital, the licensee of stations WWSD-AM and WIQI-FM, Quincy, FL., prior to the commencement of program test authority.

28. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the applicants noted in paragraphs 12 and 13 above, ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

29. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

30. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

31. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

APPENDIX

2. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of D (Capital).

3. To determine whether D's (Capital's) organizational structure is a sham.

4. To determine, from the evidence adduced pursuant to Issues 2 through 3 above, whether D (Capital) possesses the basic qualifications to be a licensee of the facilities sought herein.

FOOTNOTES

[1] We believe that the return of WCVC's amendment is consistent with the recent opinion by the Court of Appeals for the District of Columbia Circuit in *Alegria I, Inc. v. FCC*, Case No. 89-1096, Decided June 15, 1990. In that case, the court remanded to the Commission the grant of an AM construction permit to Heritage Communications because the agency had failed to articulate the rationale for its tolerance of a succession of "major" amendments which normally would have required dismissal of Heritage's application under 47 C.F.R. § 73.3571(j). The court held that "nowhere in the order under review did the Commission explicitly invoke [the *Golden Shores*] policy, explain why the circumstances of this case justified its invocation or expansion, or spell out the public interest considerations that justified its tolerance of a succession of major amendments. *Id.*, at 7. *Golden Shores*, wrote the court, appears to be "based on the rationale that because the withdrawal of an inadvertently submitted major amendment would not result in the procedural disruptions the rule was designed to avoid, an applicant should be given the opportunity to repair its mistake and return to the *status quo ante*. " *Id.*, at *status quo ante*; rather, "the Commission permitted Heritage repeatedly to amend its application until it was viable." *Id.*, at 9. Here, we are expressly invoking the *Golden Shores* doctrine, noting that the return of WCVC's amendment "neither results in processing delays nor abridges any cognizable rights of other applicants." *Id.*, at 7. Finally, WCVC's application was returned to the *status quo ante* with the return of its amendment.

[2] The applicants listed above were each notified by the Federal Aviation Administration that their proposed structure would exceed Part 77 obstruction standards.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-140

In the Matter of

Amendment of Part 74 of the FM	RM-5416
Commission's Rules Concerning	RM-5472
Translator Stations	

REPORT AND ORDER
Proceeding Terminated

Adopted: November 8, 1990; Released: December 4, 1990

By the Commission: Commissioners Marshall and Duggan issuing separate statements.

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INTRODUCTION

1. By this *Report and Order*, the Commission is amending the rules governing the FM translator service. The Commission is restructuring the FM translator rules consistent with the intended purpose of this service, which is to provide supplementary service to areas in which direct reception of radio broadcast stations is unsatisfactory due to distance or intervening terrain barriers. In particular, we revise and clarify the FM translator rules, including new rules for: ownership and financial support of translators; methods for selecting among translator applications; the definition of "major change" in translator coverage areas; use of commercial and auxiliary band frequencies; interference criteria; and technical requirements for translators.

BACKGROUND

2. FM translators are stations that receive the signals of FM radio broadcast stations and simultaneously retransmit those signals on another frequency.[1] In general, the signal of the FM radio broadcast station being rebroadcast[2] must be received directly over-the-air at the translator site.[3] FM translators were first authorized in 1970[4] as a means of providing FM service to areas and populations that were unable to receive satisfactory FM signals due to distance or intervening terrain obstructions.[5] While the Commission recognized the benefits of authorizing FM translator service, it also expressed concern regarding the possible competitive impact such translators could have on FM radio broadcast stations and the effect their authorization could have on the licensing of those stations.[6] Thus, the Commission elected to authorize FM translators on a secondary basis only and imposed rules that restrict their service, ownership, financial support and program origination.[7] The FM translator rules currently in effect are essentially the same as those adopted in 1970.

3. The Commission commenced this proceeding with a *Notice of Inquiry* (*NOI*)[8] to study the role of FM translators in the radio broadcast service. This *NOI* responded to seven parties who petitioned the Commission for rule making seeking various, sometimes conflicting changes to our FM translator rules. Rule making petitions were filed by the National Association of Broadcasters (NAB), AGK Communications, Inc. (AGK), John Davidson Craver (Craver), John S. La Tour (La Tour), Communications General Corp., Bruce Quinn (Quinn), and Robert Jacoby (Jacoby).[9] In its petition, the NAB re-

quested the Commission to impose financial support and profit-making restrictions on FM translators to prevent their use by primary stations to expand their service areas. The NAB also asked the Commission to tighten the technical rules to prevent interference from translators to FM radio broadcast stations. The other petitioners generally sought expansion of the current translator service, including program origination authority.

4. The Commission next adopted a *Notice of Proposed Rule Making* (*Notice*) [10] in this proceeding, proposing to amend the rules governing the FM translator service based on the comments submitted in response to the *NOI* and our own analysis of the translator service. We stated, in the *Notice*, that the proper role for FM translators should be as a secondary service intended to supplement the service of FM radio broadcast stations. The rule changes proposed in the *Notice* sought to ensure that translator service does not adversely affect the operation of FM radio broadcast stations. Sixty-nine parties filed initial comments in response to the *Notice* and twenty parties replied.[11]

DISCUSSION

5. We continue to believe that the proper role for FM translators is that of a secondary service intended to supplement the service of FM radio broadcast stations.[12] Further, the rule changes we now make reflect our conclusion that the sole purpose of FM translators is to provide service in areas where direct reception of radio service is unsatisfactory due to distance or intervening terrain obstructions. After review of the comments submitted in response to the *Notice* and our own analysis of these issues, we conclude that our existing regulatory structure does not adequately ensure that the FM translator service achieves its intended purpose. We are aware of the need to clarify and amend several rules in order to ensure that FM radio broadcast stations are not adversely affected by translator operations. We also have determined that several rules should be modified to assure that translators better serve the public.

6. This *Report and Order* takes the following actions to revise the FM translator rules. First, the coverage contour of a translator providing fill-in service will be defined congruent with the coverage contour of the primary station for respective station classes. An FM translator's protected contour will be defined at 1 mV/m. With respect to service issues, an FM translator may not be licensed to a commercial FM broadcast station if the translator's coverage contour goes beyond the primary station's coverage contour. However, in "white area" situations beyond the protected contour of any full-time aural service, we will be favorably disposed toward requests for waivers of our rules to permit commercial primary station ownership. Commercial primary stations may financially support fill-in translators both before and after the translator commences operation. However, commercial primary stations may provide no financial support beyond technical assistance to FM translators serving other areas, although we will favorably view waiver requests to allow financial support for translators in "white areas." Noncommercial FM stations are not subject to any ownership or financial support restrictions. For all translators, one or more announcements not to exceed a total of 30-seconds per hour are permitted in order to acknowledge and solicit funds for operating expenses. Emergency warnings of imminent danger remain permissible with no local service obligations. Commercial translators providing fill-in service may use any terrestrial means to obtain the primary station signals, with a favorable disposition toward waiver requests for similar permission entertained for "white area" translators. Commercial fill-in translators will also be authorized to use intercity relay frequencies on a secondary basis. We will retain the existing rule which prohibits use of a translator solely to relay signals of a primary station to more distant translator facilities, although incidental relays will be permitted. We clarify that licensees may operate multiple FM translators upon showing "need" as determined on technical grounds by the quality of signal received from the intended primary station or any operating translator. We adopt procedures to resolve mutually exclusive applications: "fill-in" translators of the commonly owned primary station will have highest priority; alternative frequencies will be assigned when possible; when alternative frequencies are unavailable, priority classifications for FM allotments will be used; and, where the mutual exclusivity remains, we will select applications using a first-come-first-served method. A "major change" for FM translators will be defined as any change in output frequency (output channel), or any change or increase (but not decrease) in geographic area that increases the 1 mV/m coverage area by more than 10 percent of the previously authorized coverage contour. FM translators will remain exempt from multiple ownership rules and no AM-FM cross-service translating will be permitted.

7. Regarding technical issues, we will allow all FM translators to operate on any of the 80 non-reserved commercial channels with the 20 reserved noncommercial educational (NCE) channels remaining available for NCE-FM translator use. The proposed maximum ERP standard has been reduced to 250 watts at low antenna heights (HAAT), with the provision that additional antenna height must be traded for reduced power yielding new criteria for permissible coverage distance. We will be favorably disposed toward waiving this rule to permit higher power up to 250 watts ERP at any HAAT if the applicant demonstrates that the service to a greater distance reaches only a "white area." For purposes of applying the waiver standard to NCE-FM translators, the Commission will construe any area that is not served by a full-service public radio station as a "white area." We have clarified the standards for antennas and adopted our proposed prohibited overlap criteria for interference to FM and TV Channel 6 stations. Existing stations must comply with the new service rules within three years of the effective date of these new rules, and we will entertain waiver requests where service to the public would be lost as a result. Since most translators already comply with the new technical rules, we will "grandfather" existing translators until interference problems occur, at which time compliance will be required. Prospective licensees applying for translators under the new rules should be aware that the Commission intends to enforce the standards, and those found in violation of the rules will be subject to the appropriate sanctions.

8. In an effort to simplify the treatment of numerous issues in this proceeding, this *Report and Order* examines each of the existing FM translator rules and policies separately. Below we describe the current rule or policy,

summarize the comments received in response to the *Notice* and set forth our decision to retain, to modify or to eliminate that rule.[13]

SERVICE ISSUES

Coverage area

9. The present rules do not contain a definition of an FM translator station's "coverage area." The rules, however, refer to the 1 mV/m field strength contour of the FM radio broadcast station being rebroadcast regardless of its class as an area within which a translator may provide service.[14]

10. We proposed in the *Notice*, that, for purposes of the FM translator rules, a primary station's protected contour will be defined as the predicted 0.5 mV/m contour for commercial Class B FM stations, the predicted 0.7 mV/m contour for commercial Class B1 FM stations, and the predicted 1 mV/m contour for all other classes of commercial as well as all NCE-FM stations. In this way, the FM translator rules will be consistent with the Commission's other rules with respect to the protection of all classes of FM stations. We also proposed to define the coverage contour for an FM translator station as its predicted 1 mV/m contour.

11. *Comments*. While several commenters support the Commission's proposal, the NAB states that translator coverage contour definitions should be congruent with the protected contour of the primary station for the respective station classes. Thus, the fill-in FM translator contours should be established as the predicted 0.5 mV/m, 0.7 mV/m, and 1 mV/m for commercial Class B, B1, and other FM stations, respectively, and should fall entirely within the primary station's protected contour in order to prevent a primary station's reception area from extending beyond its protected contour. National Public Radio (NPR), as well as several other public broadcasting entities, argue that wider coverage areas (0.5 mV/m, 54 dBu) are necessary for both NCE-FM translators and NCE-FM primary stations because the proposed 1 mV/m protected coverage area for NCE-FM primary stations and NCE-FM translators will degrade actual coverage areas of many noncommercial FM stations, threatening the economic viability of these stations through lost listenership. Tucson Broadcasters Association (TBA) recommends that the protected contour for all FM stations be defined as the predicted 0.5 mV/m contour. du Treil, Lundin & Rackley, Inc. (du Treil) suggests that the FM translator service should parallel the TV service, where TV translator and low power TV stations are required to protect the Grade B coverage contour even though full service stations are not protected from interference from each other to the Grade B. du Treil proposes that FM translators be required to protect the 34 dBu contour of all FM stations. KSOR-FM suggests protecting the .05 mV/m (34 dBu) contour for existing 10-watt TPO NCE-FM translators as a result of their specialized circumstances.

12. *Rules*. For purposes of the FM translator rules, a primary station's coverage contour will be the same as its protected contour and will be defined to be consistent with the Commission's other FM station protection rules. Thus, the coverage contours will be the predicted 0.5 mV/m contour for commercial Class B FM stations, the predicted 0.7 mV/m contour for commercial Class B1 FM stations, and the predicted 1 mV/m contour for all other classes of commercial and all NCE-FM stations (including all Class D secondary NCE-FM stations). We believe that it would be inappropriate to single out particular classes of primary stations and provide them with greater protection from predicted interference than they otherwise receive under the applicable rules in their service. Thus, for example, NCE-FM radio stations will continue to be protected to their predicted 1 mV/m contours rather than to their predicted 0.5 mV/m contours. Furthermore, it does not appear necessary to adopt much more conservative protected contour values since there are rules to resolve the few interference situations involving translators that may arise. *See* paras. 128-131, 137 *infra*.

13. While we proposed, in the *Notice*, to define the coverage contour for an FM translator as its predicted 1 mV/m contour, we are persuaded that it is more appropriate to define the coverage contour for an FM translator providing fill-in service to be congruent with its primary station. Thus, the coverage contour for an FM translator providing fill-in service for a commercial Class B FM station will be defined as the former's predicted 0.5 mV/m contour; the coverage contour for an FM translator providing fill-in service for a commercial Class B1 FM station will be defined as the former's predicted 0.7 mV/m contour; and the coverage contour for all other FM translators, including those providing fill-in service for all classes of stations except B and B1, will be defined as their predicted 1 mV/m contour. For a fill-in FM translator, this contour must be contained within the primary station's coverage contour.

14. Although we are making a translator's coverage contour congruent with the coverage contour of the primary station as discussed in the preceding paragraph, we decline to take similar action with respect to FM translator protected contours. Our existing rules concerning the protected service provided by FM translators and our proposal to use a uniform 1 mV/m contour for the FM translator service, provide a consistent standard for determining predicted interference. We intend to use this value to define both protection for authorized FM translator stations and those applications that are considered mutually exclusive.

Ownership restrictions

15. The Commission adopted rules restricting the ownership of FM translators by the commercial FM primary radio station in response to its concern about the potentially adverse effect if primary stations expand their service areas into other stations' service areas.[15] A licensee of a commercial FM radio broadcast station is, therefore, prohibited from owning and operating FM translators intended to provide service beyond the primary station's predicted 1 mV/m contour, if such service is within the predicted 1 mV/m contour of another commercial FM station licensed to a different community.[16] This means that a commercial FM station licensee may own and operate FM translators serving areas within its own predicted 1 mV/m contour for the purpose of filling in signal reception where its signal is impeded by geographic obstruction. In addition, commercial FM radio broadcast stations may become licensees of translators to serve areas beyond their 1 mV/m contour where there is no other predicted FM service.[17]

16. The licensee of an NCE-FM radio broadcast station is not subject to any restrictions regarding the service area of any translators it owns and operates, if the signal is transmitted over-the-air from the primary station to its

translators. A recent Commission action amended the signal delivery rules for NCE-FM translators owned and operated by their primary stations that are assigned to the reserved frequency band (channels 200-220) to permit the use of alternative signal distribution technologies. In such cases, an applicant for a translator proposing to serve a particular area is required to meet certain conditions before its application can be accepted.[18]

17. Independent parties are also eligible to become FM translator licensees for stations that are intended to rebroadcast either commercial or NCE-FM stations.[19] Under existing rules, there are no restrictions on the ownership of FM translators by independent parties since their interest in establishing such translators is indicative of a need for supplemental FM service.[20] Thus, independent parties may be licensed to operate FM translators providing service to areas within or outside the 1 mV/m contour of the FM primary station.

18. In the *Notice*, we proposed to divide FM translators into two categories. The first category includes FM translators providing "fill-in" service -- *i.e.*, the FM translator's predicted 1 mV/m contour is within the coverage contour of the primary station. The second category includes FM translators providing service to "other areas" -- *i.e.*, the FM translator's predicted 1 mV/m coverage contour extends beyond the coverage contour of the primary station. We proposed to modify the existing ownership rule so that the licensee of a commercial FM radio broadcast station cannot own an FM translator if the coverage contour of the FM translator goes beyond the coverage contour of the primary station. We also requested comment on the extent to which our proposed ownership rules are sufficient to prevent unintended uses of FM translators when considered in conjunction with our other proposals discussed below.

19. *Comments*. Most of the broadcast interests commenting on this issue support the Commission's proposal to modify the ownership rule.[21] NAB further suggests that the Commission continue to permit primary stations to own and/or fund translators operating beyond their protected contour, provided that the translator does not operate within the protected service contour of another commercial FM broadcast station nor within an AM station's primary daytime service area.[22] NAB also urges that once full-service radio station operation begins to serve the community of a translator meeting the above exception, the primary station should be required to cease ownership or funding of the FM translator within 60 days.[23] La Tour responds that this "white area" exception is meaningless, since these locations are essentially nonexistent. Capital Cities/ABC, Inc. (Capital Cities/ABC) and the Association for Broadcast Engineering Standards (ABES) urge the Commission to permit commercial FM stations to own FM translators in "other" areas as a way to ensure that residents of remote and sparsely populated areas will be able to obtain a reasonable minimum of FM reception services. They suggest that FM translators should be allowed to operate where necessary in order for a community to have at least four primary FM (reception) services.

20. NPR urges that independent owners of NCE-FM translators should have some relationship or "nexus" to the translator service area and be responsive to the concerns of the local community, in order to prevent "flipping" of licensed frequencies to another owner from the original applicant. NPR is concerned that such practices cause sudden disappearance of valued services when the translator facility transfers to another primary station. La Tour disagrees with this concept, stating that an unregulated market and the pressure for translator operators to raise financial support will be most likely to create community responsive programming, thus establishing a "real connection" for a broad variety of locally appealing FM radio services. KPBX Spokane Public Radio (KPBX) states that NCE-FM translator stations should be permitted to operate only within the primary station's protected contour or in areas where there is no other NCE-FM radio service.

21. Alpine, licensee of WAVV-FM, Marco, Florida, and Kneller, licensee of WKII-AM, Port Charlotte, Florida, provide an example of an alleged abuse of the FM translator rules. They state that FM translators of a Class A FM station from North Naples, Florida, broadcasts big band programming into the Punta Gorda and Port Charlotte communities. All four of this station's translators are licensed to the station owner's father-in-law, who resides in the midwest. Alpine complains that Punta Gorda is already well-served as it receives radio service from Ft. Myers, Naples, Sarasota, and Tampa-St. Petersburg with local service from two AM and two FM stations. Kneller shows that of the four translator locations, three are served by six, three, and two local full service FM facilities, respectively. Furthermore, the Punta Gorda translator duplicates the local format of WKII-AM of Port Charlotte (owned by Kneller) and has nearly driven Alpine's WAVV-FM off the air. Kneller states that the North Naples station denies any connection to the translators. The commenters contend that this situation violates the intended use of translators -- to fill in dead spots in a station's service area -- and that the translators are being used to benefit the primary station rather than the public.

22. *Rule*. Most of the commenters on this issue agree with our proposal to change the ownership rule. We now adopt that proposal, including the provision distinguishing between "fill-in" and "other area" translators,[24] which will permit commercial FM stations to own FM translators only where the FM translator's coverage area is entirely contained within the coverage contour of the primary station.[25] We impose no ownership limitation on NCE-FM translators or on FM translators that are independently owned.[26] While the establishment of independent party translators in these other locations indicates a public desire for the programming, translators owned by FM radio broadcast stations would more likely indicate a station's interest in reaching audiences in areas that lie outside its service area. More generally, we believe that to relax restrictions on FM radio broadcast station ownership of translators would conflict with our belief that the public interest is best served by maximizing service through the use of FM radio broadcast stations. We continue to believe that the most appropriate and efficient means of providing additional FM service nationwide is by creating opportunities for the establishment and development of full service broadcast stations. We believe that a modification of our rules to permit the expansion of FM service through the use of translators would be inconsistent with our basic FM allotment scheme. Such a change also would be particularly undesirable while we are implementing Docket No. 80-90 through the authorization of a large number of new and upgraded stations because the

potential for interference between these new facilities and new translators is substantially greater until most or all of the new and upgraded primary stations are operating.

23. The Commission believes that the record lacks the evidence to suggest that a "white area" exception to our ownership rule would noticeably improve coverage and public service and leads us to conclude that a specific "white area" exception is unnecessary. However, in situations where a licensee establishes that service is indeed unavailable, we will be favorably disposed toward requests for waivers of this rule to address these unique circumstances. Within the context of this proceeding, we will define a "white area" as any area outside the coverage contour of any full-time aural service. We emphasize that in order for commercial primary stations to own translators in such areas, the Commission will require a showing of a lack of service in accordance with the "white area" definition given above.[27] Independent party ownership of translators in "white areas" will be permitted under the general provisions of this rule. With respect to provision of service to remote areas experiencing limited radio service, we note that our ownership restriction does not prohibit FM translator service in these "other" areas, it simply rules out commercial primary FM station ownership of such translator stations. Independent parties may establish FM translators to serve any area.

Financial support

24. The current rules provide certain restrictions on financial support of FM translators by commercial FM radio broadcast stations. In particular, we do not grant construction authority to an independent party applicant who proposes to construct a new FM translator station beyond a commercial primary station's predicted 1 mV/m contour, and within the predicted 1 mV/m contour of another commercial FM broadcast station assigned to a different community, if such independent party applicant will receive, directly or indirectly, any financial support or contribution from the primary station for application and construction costs, or any other costs incurred up to the time the translator commences operation.[28] However, a primary station licensee may support the operation and maintenance of such a translator after operations commence.[29] No similar restrictions apply to NCE-FM licensees.

25. In the *Notice*, we proposed to allow a commercial primary station to support translators providing fill-in service, both before and after the translator station commences operation, but to prohibit a commercial primary station from supporting, directly or indirectly, any FM translators providing service to other areas, both before and after they commence operation.[30] We stated that the proposed revisions to our financial support rule should remove the ambiguities that have led to the alleged abuses reported in the comments submitted in response to the *NOI* by NAB and others. We also asked whether parties might still circumvent the proposed rule, through "under the table" reimbursements or any other consideration not addressed by the proposed rule, and sought comment on specific clarifications that might discourage such activities.

26. *Comments*. Several commenters support the Commission's proposal to prohibit commercial primary station support of FM translators in "other" areas.[31] CBS states that the restrictions on financial support are the only realistic means of moving toward the goal of non-expansionist FM translators since it is virtually impossible to monitor the extent of financial support to translators by primary stations. NAB and Capital Broadcasting *et al.* support the Commission's proposal but would also permit primary station funding for FM translators in "white areas." Capital Cities/ABC proposes that an exception should be made for translators serving "underserved areas", defined as areas receiving fewer than four radio signals.

27. ABA claims that the incidence of competitive abuse through FM translators has been high in Arizona, where distant signals exceed the number of local signals in some communities, while few translators have been licensed to other communities where service is truly lacking. NAB cites the example of KCLS-AM of Flagstaff, Arizona, regarding the adverse effect of FM translators upon the radio environment in general, and vulnerable AM stations in particular. NAB notes that Tucson stations, imported by FM translators in Flagstaff, dominate the top rated radio stations in Flagstaff and, thus, allegedly drove KCLS-AM from the air. La Tour offers a letter from Michael N. Ferguson, President of Northern Arizona Broadcasting, Inc., the licensee of the KDKB-FM translator in question, who states that KCLS-AM was owned by Arizona land developer Jim Kurtz, who sought to use the land for a mobile home development. Mr. Ferguson also states that the programming rebroadcast by the translator is considerably different from the KCLS-AM format such that it could not compete with the AM station as alleged. Accordingly, Columbia Bible College Broadcasting Company (Columbia) states that any instance in which an FM translator knocks a broadcast station off the air simply indicates that the primary station was not adequately serving the special needs of the local community.

28. La Tour strongly opposes restrictions upon financial support on the grounds that many translator services would be eliminated, thus causing economic damage to the primary station as well as the translator operator.[32] La Tour's perspective is based upon the premise that FM stations in smaller markets must be able to use translators in order to penetrate larger markets, where greater advertising revenues may be earned, in order to compete on a "level playing field" with larger market stations. In addition, La Tour contends that translator use should not threaten the FM environment because primary stations will only be willing to support stations that meet a legitimate need through unique programming formats and potential for listenership. He questions the feasibility of policies in which translator operations are funded solely by charitable donations from listeners and supporting businesses, especially in smaller market areas where the need for translator services is particularly strong. Further, La Tour states that translator listeners who prefer more "narrowcast" program formats are harmed because they would be forced to pay twice for such programming: once through the product price paid by all consumers; and, again, through translator contributions. Moreover, La Tour questions whether the Commission has authority for such economic regulation of a broadcasting station. As an alternative to the Commission's proposal, La Tour suggests a limit, either in the form of a maximum number or ratio, imposed upon the number of translators for each market area similar to the limit for high power radio

stations. La Tour argues that this alternative would preserve program variety and service to various regions while providing some bridle for competition.

29. The National Translator Association (NTA) comments that the Commission's rule proposal reflects a concern with suburban stations or rural stations located near urban markets having their signals retransmitted into the urban market. NTA contends that the rule changes proposed in the *Notice* are overly broad and will result in the extinction of the FM translator service in rural areas.[33] NTA argues that the mere allegation of rule violations cannot justify revision of the rules, since the proper remedy for such problems is to enforce existing rules rather than to make new rules. NTA states that in order to enforce the existing financial support rules, the Commission should require that each FM broadcast station include with its annual ownership report a statement of whether it provides financial, technical, or in kind support to any translator, stating the total value of support provided for each translator. FM translators should also be required to file statements of support with their renewal applications, providing similar information about the amounts and sources of their funding. These reports, which would be open to public inspection, would enable interested parties to monitor potential abuses, while permitting primary stations to provide reasonable amounts of financial support to translators with minimum reporting requirements. As a final matter, translator operators in Utah request that the Commission permit primary stations to provide technical assistance to FM translator licensees.[34]

30. *Rule*. As proposed in the *Notice*, the Commission will allow a commercial primary station to support translators providing fill-in service, both before and after the translator station commences operation. Also, we will prohibit a commercial primary station from supporting, directly or indirectly,[35] any FM translators providing service to other areas, both before and after they commence operation.[36] In order to encourage the introduction of service to "white areas", however, the Commission will be favorably disposed toward requests for waivers of this rule to permit a commercial primary station to support its own translator, or an independently owned translator, providing service to these unserved areas. Under the current rules, it is virtually impossible to monitor the extent to which primary stations offer financial support to translators. We believe that this revision of the financial support rule is necessary to assure that translators are used only for their intended purpose. Also, underserved communities will have the opportunity to fund FM translator service according to the new rule through their independent charitable support. Although the Flagstaff situation cited by NAB does not offer conclusive evidence of abuse, we are convinced that the recent expansion of FM translators was facilitated by the financial support arrangements permitted under the original rule. To the extent that this expansion threatened to undermine the vitality of FM and AM services, we believe that the public will be best served by the revised financial support rule we now adopt.

31. We observe that La Tour's general argument for expanded FM translator service is based upon his perspective that translator facilities offer the "level playing field" by which broadcasters in small markets may gain access to the attractive advertising revenues of larger markets. We continue to believe that Mr. La Tour's vision of a "level playing field" could potentially undermine the development of broadcast station service due to the lower cost structures and lack of local service obligations of these reception facilities. Second, Mr. La Tour wishes to compete with broadcasters by offering narrowly tailored formats to local communities, yet his comments seem to obscure the categorical distinction between FM translators and broadcast stations. Indeed, given that FM translators and broadcasters are not similar entities, the disparity in treatment in order to promote incentives for new broadcast stations offering diverse programming formats is reasonable. Consequently, we find that Mr. La Tour's arguments for loose constraints upon financial support for FM translators would detrimentally affect the competitive balance between broadcast stations and translator facilities by redistributing revenue away from broadcast stations, and thus, potentially limiting primary radio service to the public.

32. We reject as unworkable the La Tour proposal that we limit, either in the form of a maximum number or ratio, the number of translators in each market rather than prohibit financial support by the primary station. Each local market has a unique capacity to support FM translators, based upon available frequencies and other factors related to interference, population and income. Thus, any number or ratio we might pick could unduly constrain service to the public in some instances, and permit excessive growth of FM translators in other areas. We also reject NTA's proposal that we retain the existing financial support rule and adopt financial reporting requirements for both broadcast station and FM translator licensees. NTA's proposal burdens both licensees and the Commission. Furthermore, NTA's alternative does not solve the existing rule's fundamental enforcement problem, namely the practical difficulty and resource requirements of determining the appropriate level of compensation from the primary station to the translator.[37]

Fundraising by translators

33. The current rules provide that translators may originate one announcement per hour of up to 30 seconds, to solicit or acknowledge financial contributions made to defray the costs of installing, operating and maintaining the translator station.[38] Such announcements are to be made principally for the purpose of acknowledging financial contributions and may include identification of the contributors, the size or nature of the contributions and advertising messages of contributors.[39] The licensee of the translator may not make these announcements "for the purpose of making a profit."[40] The same restrictions which apply to solicitations by and contributions to noncommercial FM stations are also applicable to noncommercial FM translators.[41]

34. We proposed, in the *Notice*, to retain the existing rule allowing a total of 30 seconds per hour to solicit contributions or to acknowledge contributions. We also proposed to clarify the rule to permit announcements for solicitation or acknowledgement of contributions to be split during the hour. Finally, we asked commenters whether our proposed rules concerning fundraising by fill-in and other area translators should be clarified by the inclusion of a definition of what constitutes acceptable solicitations and acknowledgements.

35. *Comments*. NAB, as well as many broadcast interests, support our proposal to retain the 30 second limitation for on-air fundraising.[42] NAB also suggests that the

Commission permit only community-owned translators to originate acknowledgements or solicit contributions. In addition, NAB argues that all FM translators should be subject to enhanced underwriting restrictions similar to those of NCE-FM broadcast stations when acknowledging contributors.[43] Several of the noted commenters also support the Commission's proposal to permit the 30 seconds to be split during the hour, while NAB, as well as Northland, disagree, stating that the rule is necessary to limit profit-making opportunities and to avoid unnecessary clutter of primary station programming.

36. KBUR-AM/KGRS-FM alleges an example of an "abuse" of the 30-second limitation on FM translator fundraising in Burlington, Iowa. KBUR/KGRS produces a copy of a proposed translator contract and cover letter signed by Dan Hendrix, an employee of La Tour's Power Du Pree Broadcasting Co., the terms of which call for the primary station to broadcast one 60-second advertisement provided by the translator operator per hour during each hour in which the primary station is broadcasting. Also, in the event of special programming, sports events, political speeches, etc., the contract states that the primary station may run the advertisements at an alternate time with prior written permission of the translator licensee.

37. KBUR/KGRS also presents copies of business cards, letterhead, newspaper advertisements, and a newspaper article citing on-air practices, which refers to La Tour's existing Burlington translator KZ285DJ station as "Burlington's Lite 104.9." KBUR/KGRS argues that this reference misrepresents the nature of Mr. La Tour's facility, which should be identified as "WCAZ, Carthage, Illinois, on translator KD285DJ." KBUR/KGRS states that not only does this practice mislead local merchants into believing that they are advertising on a locally oriented FM station, but listeners may be misinformed during weather or news emergencies.

38. Several commenters suggest that FM translators should be able to cover costs of necessary maintenance and to generate revenues in excess of operating costs. These commenters suggest, therefore, that the Commission expand the fundraising opportunities for FM translators. La Tour argues that the 30 second limitation, when combined with the cessation of financial support from the primary station, will effectively eliminate independently owned FM translators providing narrow-format programming. Mr. La Tour argues that FM translators must be offered some reliable alternative and expanded means of raising support beyond existing charitable sources. WTI proposes, and La Tour concurs, that FM translators should be permitted to make use of multiplex subcarriers as provided in Section 73.293 of the rules. WTI and La Tour also support expanding the existing 30-second per hour limit on local announcements to 60 seconds per hour, while also asking that FM translators be permitted to divide or combine announcement time in any manner convenient to the licensee.[44] Finally, Christian Media Associates, Inc. (Christian Media) requests a one minute block per half hour to air acknowledgements and solicitations.

39. La Tour contends that requiring FM translators to solicit funds solely through local on-air announcements will inconvenience listeners through frequent interruptions by annoying solicitations inserted into primary station programs. Furthermore, La Tour, as well as WTI, believe that the FCC should not restrict wording or content of announcements beyond those restrictions applied to commercial radio stations.[45] La Tour subsequently notes that it has not been demonstrated how content restrictions may benefit the public.

40. *Rule*. The Commission will retain the existing rule which limits on-air fundraising activities of FM translators to 30 seconds per hour. We believe that the present 30-second limitation provides a reasonable opportunity for FM translators to acknowledge contributions as well as to solicit funds from their listeners as necessary for the facility's operation. Furthermore, we are concerned that an increase in the 30-second limit would be inconsistent with the secondary nature of FM translators.[46] We believe that any additional time provision for on-air fundraising would unnecessarily detract from service to the public by interrupting primary station programming. Moreover, we believe that additional time allotted to on-air solicitation and acknowledgments will fractionalize audiences as well as revenues. The existing rule remains consistent with the new, more restrictive limits adopted above for translator ownership and financial support, all of which are designed to assure that FM translator operations are constrained to their intended role as an auxiliary service.

41. As with the alleged abuses regarding ownership and financial support, we are also concerned by the purported abuses alleged by KBUR/KGRS. Therefore, we wish to emphasize that any Commission licensee which engages in a practice designed primarily to evade the 30-second limitation potentially subjects itself to the full panoply of Commission enforcement mechanisms. Indeed, because intentional evasion of Commission rules represents behavior which jeopardizes the Commission's ability to discharge its regulatory mandate, we view such behavior with particular disfavor.

42. We will also permit solicitations or announcements to be split during the hour. We believe that while the 30-second limit is the appropriate standard for fundraising efforts, it is unnecessarily restrictive to stipulate how that time should be allocated. Considering that the announcement and solicitation time is brief, a station's choice to split the 30 seconds should not noticeably burden listeners through interrupted programming. Likewise, we believe that the present format for acceptable acknowledgements by commercial FM translators -- which includes identification of contributors, the size and nature of contributions, and advertising messages of these contributors -- gives sufficient guidance as to what should be communicated during the permitted time. Admittedly, the advertising portion of the acceptable announcement causes some concern to broadcasters. However, translators must be able to raise operating funds. We believe that some information about contributors must be allowed in order to enable translators to encourage donations and, thus, provide the public with radio service. In addition, we do not wish to unnecessarily intrude upon the initiative of FM translator licensees who attempt to raise funds within the given parameters. Therefore, we will maintain the existing language.

43. The rule will continue to permit all translators, whether owned by their primary station or by an independent party, to originate 30 seconds per hour for fundraising purposes. Although NAB has suggested that we restrict fundraising opportunities to community-owned translators, we find no reason to change the current rule. The Commission's rules for FM translators have never distinguished between various categories of independent ownership. Given that both community groups and "third

parties" must each raise funds for their translator operations, we will permit all independent owners to do so within the parameters of the 30-second limit without further restrictions.[47]

Local program origination authority

44. The current rules limit FM translators to rebroadcasting the signal of an FM radio broadcast station.[48] Program origination by all translators, commercial and NCE-FM, is prohibited with the exception of origination authority to acknowledge or solicit financial support and to provide emergency warnings of imminent danger.[49] Moreover, emergency transmissions are limited in time and frequency to that necessary to protect life and property. Furthermore, where the translator is owned by an independent party written consent is required for the rebroadcast of radio broadcast station's signal.[50] In the *Notice*, we proposed that the existing prohibition against program origination authority for translators be retained.

45. *Comments*. Most commenters agree with the Commission's proposal to make no change in the program origination rule.[51] NAB states that there is no public interest need for expansion of translator station program origination. CBS contends that translator program origination would be inconsistent with the secondary nature of translator service and would generate direct, low power competition for FM stations. London Bridge states that if radio service is needed, then traditional FM station applications should be filed.

46. Conversely, La Tour contends that the public will be better served by translators with local program origination authority. La Tour suggests that FM translators are uniquely able to provide narrow appeal formats such as Christian, classical, and children's programming due to the low cost of operating the facility. Houston L. Pearce of Radio South, Inc., observes that translators may also be used to compete with other stations, arguing that one of Mr. La Tour's translators in Tuscaloosa, Alabama is not contributing a unique format to the area. Pearce alleges that La Tour provides an urban contemporary format from a translator in Tuscaloosa which rebroadcasts station WSLY-FM, York, Alabama, which in turn rebroadcasts the programming of WALT-AM in Meridian, MS. Pearce indicates that the translator's programming is already provided by WTUG-FM, which has served the community for over 12 years, and WENN-FM which is a Class C station from Birmingham, AL. Furthermore, an FM translator in Meridian, MS, retransmits the programming of WSLY-FM. Alpine and Kneller provide another example of duplicated formats in the situation cited above from Punta Gorda, Florida. Alpine alleges that the Punta Gorda translator exactly duplicated the big band format of Kneller's WKII-AM of Port Charlotte, which was ultimately forced to alter its programming.

47. Several commenters propose intermediate options for program origination authority for FM translators. Gerard A. Turro (Turro) proposes, based upon the Bergen County, New Jersey, circumstance and his petition for waiver, that translators should have authority to originate local programming when serving counties with no present, locally-situated commercial FM stations, nor any possibility of future FM station allotments. In this way, Turro argues, a translator can provide the local community with reports on local events and news such as school closings, traffic emergencies, or water main breaks. Turro suggests that such origination authority should remain secondary in status to full-service FM broadcasters. FM Technology states that FM translators should be authorized to originate programming in areas void of any other service that addresses their needs. KSOR suggests that NCE-FM translators be permitted to provide news service, such as election coverage, to the local community.

48. *Rule*. We continue to believe that we should not authorize program origination for FM translators, even on the limited basis proposed by Mr. Turro and other commenters. The proper role of FM translators among aural services to the public is to provide secondary service to areas in which direct reception of signals from FM broadcast stations is unsatisfactory due to distance or intervening terrain obstructions. In view of our commitment to provide FM radio broadcast service in a manner that promotes program diversity while enhancing the incentives for efficient broadcast station development, we believe it is desirable to hold constant the existing relationships between FM broadcast stations and translator service. Furthermore, we believe that our efforts to improve local service must be balanced against the technical degradation to the overall broadcasting system that could result from a proliferation of translator stations. Thus, we will maintain FM radio broadcast stations and translators in their current role as providers of primary and secondary service, respectively.

49. Where there is sufficient community interest, the rules that permit translators to rebroadcast the programming of FM stations provide an opportunity to import programming formats otherwise unavailable. Furthermore, our existing rule, which permits unlimited programming in the event of an emergency, gives the translator licensee an adequate vehicle for informing local residents of any such situations. Yet, in these areas, we believe that allowing low cost translators to operate essentially as FM radio broadcast stations, without subjecting the translators to the requirements imposed on the radio broadcast stations, would undermine our preference to provide service through more efficient primary service stations.[52]

50. In our *Notice* we subsumed Turro's request for waiver of Section 74.1231 of the Commission's rules to permit his FM translator station (W276AQ) to originate local programming.[53] We reasoned that since the issues raised in Turro's specific request were similar to the broad policy questions raised in the *Notice*, they should be considered in this single item. We have reaffirmed that the FM translator service should facilitate the reception of radio signals to areas deprived of such service due to distance and intervening terrain obstructions. We continue to believe that this is the proper role of FM translators and that our scheme of classifying FM and standard broadcast stations should not be subverted by the creation of a new transmission service.[54]

51. Apart from the broad policy questions that have led us to reject Turro's proposal, there are a number of other reasons to deny his waiver request. Foremost, Turro has not made a sufficiently compelling showing that Bergen County is without aural broadcast service. We note that the county is already served locally by WDJ(AM), Hackensack, New Jersey which has obligations to its community of license and surrounding areas. Additionally, three NCE-FM stations are licensed to Bergen County communities: WFDU(FM) in Teaneck, WRRH(FM) in Franklin Lake, and WRPR(FM) in Mahwah. A 10,000 watt com-

mercial AM station (WVNJ) is presently under construction in Oakland, New Jersey. Thus, not only is the county the recipient of over 60 radio broadcast stations, it is the locus of 5 authorized radio stations, all bearing a responsibility and opportunity to serve the county in time of emergencies. Other nearby radio stations, such as WPAT-AM/FM, licensed to Paterson, New Jersey, broadcasts the results of Bergen County elections. WCBS-AM/FM, licensed to New York City, filed comments showing that it provides the county with daily traffic reports, public service announcements, programming of local interest and school and weather reports. Thus, while a number of local services are apparently available to meet the demands of Bergen County, albeit not as envisioned by Turro, he has not shown why the county cannot arrange with these stations to provide any desired programming or why Turro himself cannot contract with these or other stations to attain his desired objectives. Turro's facility is already empowered, as are all FM translator stations, to serve the county in times of emergency by broadcasting information in order to protect life and property.[55] Where the ability to provide local public information is constrained by available funds, we emphasize that our rules permit unlimited independent financial support for this form of FM translator service.

52. Next, Turro has not shown that his situation is so unique that other applicants would not seek similar treatment. By his own admission through a detailed study included in his comments, numerous counties similarly have no dedicated allocation. If we were to grant Turro's request, we would be compelled to grant these presumptively similar requests as well, resulting in the creation of a new transmission service using the very facilities that we have affirmed as being restricted to reception purposes. Turro's comments also overlook the fact that the Commission allocates frequencies on the basis of communities, not counties, such that a new system of allocation would be necessarily based on the needs of counties without consideration of its consequences on the Commission's long-standing distribution objectives. Consequently, for the reasons set forth above, the Commission will deny Mr. Turro's request for waiver of Section 74.1231 of the rules.

Local service obligations

53. Under the current rules, FM translators have no local service obligations. We proposed in the *Notice* to continue to exempt FM translators from local service obligations in all areas. We stated that imposing local service obligations on translators would exact a cost on their operations that could jeopardize their existence, contrary to our goal of extending service to areas that would otherwise remain unserved.

54. *Comments*. La Tour states that local translator operators would be pleased to accept public service responsibilities in exchange for program origination authority. Furthermore, he contends that listeners who prefer the more narrow formats should not be deprived of local weather, news, and other public service information. Alternatively, La Tour contends that the Commission could give primary stations local service responsibilities for their translator markets as well as their primary markets. No other commenters specifically addressed this issue.

55. *Rule*. We find no compelling reason for imposing local service obligations on translator licensees. Because FM translators are a secondary service with limited means of support, it would be burdensome to impose additional program responsibilities upon translators. La Tour contends that translators would reasonably accept local service obligations in order to offer narrow programming formats. We reiterate that translator program origination is inconsistent with the Commission's competitiveness and efficiency interests as expressed above, such that any local service obligations would be unwarranted.

Signal delivery

56. The current rule generally provides that translators may only rebroadcast the signal of an FM radio broadcast station or another translator that is received directly over-the-air.[56] The only exception is that an NCE-FM translator station operating on a reserved channel, and owned and operated by the licensee of the primary station, may use alternative signal delivery means, including, but not limited to, satellite and microwave facilities under certain conditions.[57] In the *Notice*, we proposed to change the signal delivery rule to permit commercial FM translators providing fill-in service to use terrestrial microwave transmission facilities. We stated that this change will facilitate the rebroadcast of FM station signals to remote or geographically inaccessible areas where over-the-air terrestrial retransmission has not been particularly effective.

57. *Comments*. Many broadcast interests support the Commission's proposal to authorize commercial FM translators providing fill-in service to use terrestrial microwave transmission facilities.[58] NAB favors off-the-air delivery of signals as an adequate method for most FM translator operations. NAB remains opposed to FM translators receiving space satellite program feeds, and suggests that the Commission revisit its decision to permit satellite feeds to certain NCE-FM translators. However, NAB supports the FCC's proposal to allow "fill-in" translators to use microwave links, despite previously opposing any translator use of microwave facilities. NAB now contends that fill-in use of microwave links would improve signal quality and, thus, serve the public interest. Furthermore, NAB argues that FM translators owned and funded by primary stations should be permitted to use microwave program feeds in serving "white areas" until radio service becomes available to the region.

58. ABA and London Bridge oppose any alternative signal delivery authority for FM translators. NPR states that the Commission's philosophy towards FM translators as evidenced in the *Notice* indicates that satellite delivery of signals is inconsistent with the secondary status of FM translators. NPR suggests therefore that the Commission overturn the exception which permits NCE-FM translators owned and operated by their primary station to use alternative signal delivery means. NPR urges that the FCC continue to recognize the "Alaska exception" if distinctions in signal delivery authority between commercial and NCE-FM translators are eliminated.

59. La Tour notes that if noncommercial translators are permitted to use alternative signal delivery in order to provide a higher quality signal, then commercial translators should also have access to the same signal delivery authority since both forms of translators operate on the same principles of reception and transmission. La Tour suggests that listeners who prefer narrow formats should not have to tolerate inconsistent service nor sacrifice the quality of broadcasts when better technology is available. du Treil suggests that any alternative means

should be employed, including telephone company circuits. Vernier states that any available methods, including twisted pair, fiber optic or satellite should be used for fill-in signal delivery. WTI supports the use of any superior technology on all channels for all licensees. Christian Media recommends that independently owned FM translators should be allowed use of satellite or microwave feeds.

60. Temple University of the Commonwealth System of Higher Education (Temple), as well as a few other public broadcasters, propose that the option of alternative signal delivery should be extended to NCE-FM translators on non-reserved channels (Channels 221-300) owned and operated by a primary station in order to avoid interference with TV Channel 6. Temple suggests, further, that the signal delivery option should be limited to translators located within 75 to 100 miles (120 to 160 km) of the primary station, corresponding to the distance over which a translator can receive an over-the-air signal without interference.

61. *Rule*. We will change the signal delivery rule to permit commercial translators providing fill-in service to use any terrestrial transmission facilities in order to obtain the primary station's signal including, but not limited to, microwave, phone company circuits, and dedicated fiber optic cable.[59] In addition, for "white areas" where service is indeed unavailable, we will be favorably disposed toward requests for waivers of this rule so that commercial FM translators, owned independently or by primary stations, may receive signals by any terrestrial means. We believe that this change will facilitate the rebroadcast of broadcast signals to remote or geographically inaccessible areas where over-the-air retransmission has not been effective.

62. In response to those commenters seeking to extend signal delivery authority to include various alternative methods, we state that the off-the-air signal feed should be adequate for most FM translator operations. In such fill-in instances where the quality of the off-the-air signal would be unacceptable, our decision to authorize the use of any terrestrial transmission facilities should enable translators to receive a signal suitable for rebroadcast. We believe that any further extension of authority would be inconsistent with the role of FM translators as a secondary service not intended to supplant the services provided by radio broadcasters.

Use of auxiliary frequencies

63. Under existing rules and policies, only NCE-FM translators owned and operated by their primary station may use auxiliary broadcast frequencies for program reception.[60] In the *Notice* we proposed to authorize commercial FM translators in fill-in areas to use aural broadcast auxiliary frequencies (intercity relay stations) on a secondary basis.[61] We also proposed to condition the use of these frequencies on advance coordination with local frequency coordinating committees, or local broadcast users in the absence of a coordinating committee. Specifically, we proposed to modify our rules to: 1) make aural broadcast intercity relay stations available for the transmission of program materials between an FM radio broadcast station and its translators; 2) authorize the transmission of program material between FM radio broadcast stations and the FM translator facilities; and 3) amend the licensing procedures to accommodate such usage.

64. *Comments*. NPR and FM Technology support the Commission's proposal. Other commenters support the Commission's proposal with further suggestions. WTI suggests that the Commission authorize the use of auxiliary frequencies for all FM translators, not just for translators providing fill-in service. Corinthians XIII supports the use of auxiliary frequencies and suggests that the Commission grant use of the frequency despite local broadcaster objections, given a showing that its use will not cause interference.

65. NAB opposes the secondary use of broadcast auxiliary facilities by fill-in translators on the grounds that auxiliary frequencies are approaching spectrum saturation. NAB argues that additional spectrum use, even under secondary conditions, may impede primary station use of the frequencies. NAB states that broadcast auxiliary facilities should be limited to the Private Operational-Fixed Microwave Service facilities licensed under Part 94 of the Commission's rules. CBS states that although program delivery may be possible on 950 MHz, other auxiliary frequencies should not be used due to the possibility of creating interference with existing broadcasters. In larger metropolitan areas, aural intercity relay frequencies are already congested and both TV and radio stations use the frequencies for electronic news gathering purposes to cover area events. CBS contends that coordination between the latter media and FM translators would be difficult to arrange.

66. *Rule*. We will authorize commercial FM translators providing fill-in service to use aural intercity relay frequencies on a secondary basis. The use of these frequencies will be conditioned upon advance coordination with local frequency coordinating committees, or local broadcast users in the absence of a coordinating committee. For "white areas," we will also be favorably disposed toward requests for waivers of this rule to permit FM translators owned independently or by commercial primary stations to use aural intercity relay frequencies on a secondary basis. We believe that this use of auxiliary frequencies, with the specified limitations, is consistent with FM translator's role as a supplemental service to that of FM radio broadcast stations. Notwithstanding some parties' arguments that these frequencies are congested in many areas, we find it likely that broadcast intercity relay channel space is available in those more remote areas where translators are needed most. Therefore, our authorizing intercity relay frequencies in these areas would be in the public interest because it would facilitate signal delivery. However, the secondary nature of this proposed authorization should minimize its effect on the availability of broadcast intercity relay frequencies in those areas where congestion already exists.

Conditional relaying

67. The current rules permit FM translators to engage in "conditional relaying," *i.e.*, retransmission by one translator of the signal of another FM translator, if the translator is not used solely to relay the signal of the primary station to a more distant facility.[62] The rules state that each FM translator is intended to provide direct reception to the public; any other use is incidental. We proposed in the *Notice* to retain the current rule on conditional relaying for translators.

68. *Comments*. The various broadcast interests commenting on this issue support the Commission's proposal to retain the rule concerning conditional relaying.[63]

While these commenters generally oppose the development of translator relay networks, NAB mentions the limited circumstance in which an FM translator serves a legitimate "white area," suggesting that relay operation should be permissible within the "white area." NPR and La Tour agree that conditional relay networks of signals under the incidental service provisions of the rules pose little threat to existing broadcasters, even when operated through virtually unpopulated areas. They claim that incidental relays provide a more reliable signal to distant communities in need of service, while La Tour highlights the additional programming offered to the mobile community along highway systems.

69. *Rule*. We will retain the existing rule which prohibits use of a translator solely to relay signals of a primary station to more distant facilities, but permits incidental relays. We believe that our existing rules are adequate to prevent potential abuses through translator relay networks. Furthermore, our revised financial support and ownership rules resolve objections raised by commenters concerning translator relay networks established by primary stations seeking to expand their broadcasts into distant markets. Under our new rules, an FM radio broadcast station would be unable to own, operate or support FM translators in areas outside its coverage contour except as provided by waivers for "white areas." Translators serving those areas must be operated by independent parties without any financial contribution from the primary station. Therefore, these revised rules will effectively prevent the establishment of translator relays when their principal purpose would be to extend the geographic coverage of primary stations into other areas already served by AM or FM radio broadcast stations.

Need requirements for translators

70. Section 74.1232(b) states that an applicant may be licensed to operate more than one FM translator, even if such translators serve substantially the same area, upon an appropriate showing of need for the additional stations.[64] The rule does not contain specific guidelines defining the showing necessary to justify grant of a translator application, or the showing sufficient to demonstrate lack of need. Under our current standard, the need for a translator is presumed upon the filing of the application. Only if a *prima facie* showing of lack of need is made, or if an applicant is seeking more than one FM translator to rebroadcast the same primary station, do we require the applicant to document a need for the proposed new FM translator station.

71. In the *Notice* we proposed to revise Section 74.1232(b) of the rules to clarify that "need" refers solely to the quality of the primary station's signal present at a receiver site (*i.e.*, technical necessity) and that programming content, format, or transmission needs of an area will not be considered in our determinations. We proposed to apply similar standards to translators providing fill-in service, as well as to translators providing service to other areas. We also proposed to clarify that in order for a primary station to demonstrate the need to own a second translator within its coverage contour, it must only show that a technical necessity exists for the additional translator. We stated that removing any issues of programming from translator applications will eliminate unnecessarily subjective deliberative criteria from the application process. Conditioning "need" solely on technical criteria will clarify the information required for translator applications, expedite the processing of those applications and facilitate the delivery of higher quality broadcast signals to the public.

72. *Comments*. Several commenters support the Commission's proposal.[65] NAB contends, however, that "need" considerations should go well beyond the quality of signal reception. In particular, the burden of proof regarding need for a translator in a given area should be shifted to the proponent, as the present onus unfairly disadvantages opponents by requiring a demonstration of a lack of need. NAB believes that "fill-in" translator applicants should be required to file a shadowing study indicating that terrain obstacles prevent adequate primary station coverage within the relevant contour.[66] Similarly, in evaluating translators applying to serve other areas, the FCC should consider whether the relevant area is already adequately served through existing broadcast signals while also establishing stronger standards to discourage independent party ownership of other area translators.[67]

73. NPR suggests that the burden of proof regarding "need" should vary according to circumstance. The "lack of need" burden for "fill-in" service should be placed upon opponents while shifting the onus for need to the applicant in "other area" instances in order to ensure opportunities for NCE-FM stations and other service to unserved or underserved areas.

74. La Tour states that programming variety is an appropriate criteria to prove "need" for FM translator service. He says that supply and demand forces of the marketplace are best suited to make "need" determinations as demonstrated intrinsically through an application for translator service. La Tour recommends that the Commission refer to the study prepared by the staff of the Federal Trade Commission regarding public benefit from and need for additional radio services.[68] Finally, La Tour indicates that applicants should not be overburdened by excessive evidentiary requirements nor through delays in the application process.

75. *Rule*. We believe that it is appropriate to clarify, as proposed in the *Notice*, our definition of "need" as a criterion in the licensing process when applicants seek to operate more than one translator. Thus, showings of "need" should focus upon the technical necessity for the additional facilities as determined by the quality of signal received from the intended primary station or any operating translators for both "fill-in" as well as "other area" FM translators. We believe that the technical interpretation of "need" is appropriate given the role of translators as a reception service. To support their applications for multiple translators in the same area, applicants will be required to describe any relevant terrain obstruction as a means of showing "technical need", and if useful, may include a shadowing study. Contrary to the suggestion by Mr. La Tour, we are convinced that programming considerations are not warranted as a component of "need" because of the secondary nature of FM translator service and because such highly subjective deliberative criteria would both delay and complicate the application process. FM translators are intended to resolve reception problems, the "need" for which should be determined on technical grounds alone. We also reject NPR's proposal to shift the burden of proof to applicants for "other area" translators. Independent ownership of translators is indicative of a legitimate need for service and, where techni-

cally feasible within our parameters, we believe that such service should be authorized without creating an additional requirement for demonstrating that "need."

Method for selecting among applicants

76. Our existing procedure for selecting among mutually exclusive competing applicants for translator authority relies upon voluntary mutual agreement among the applicants. We stated in the *Notice* that in light of our proposal to eliminate the rules restricting FM translators to certain limited frequencies and to permit them to use all 80 channels (Channels 221-300) of the commercial FM frequency band, we believed that mutually exclusive applications will not arise with any frequency. In the rare event that we are faced with mutually exclusive applications, we proposed to assign alternative frequencies as necessary for the applicants. Applications for FM translator stations proposing to provide fill-in service of the commonly owned primary station will be given priority over all other applications. In those instances where there are no available frequencies to substitute for a mutually exclusive application, we proposed to apply the priority classification specified in BC Docket No. 80-130, as appropriate, in selecting a winning applicant for the FM translator station.[69]

77. *Comments*. NAB and other broadcast interests support the Commission's proposal. Other commenters, while supporting a priority system in concept, propose alternative rankings. For example, NPR argues that the need for public radio should be a first-tier rather than a third-tier consideration due to the high federal priority placed upon extending public radio in recent legislation. WTI argues for, and La Tour supports, a priority system which assigns a high priority for a displaced translator service and an existing translator seeking changes, and a low priority for fill-in service. CBS proposes that the priority granted to fill-in service should be conditioned upon the actual provision of fill-in service in order to prevent licensees from switching to another primary station at a later date. Further, CBS proposes that if fill-in service is necessary and spectrum is unavailable due to distant signal importation by a translator, the importing translator should be required to provide the fill-in service or return its license. Finally, CBS, with the support of other commenters, argues that all other applications should be granted on a "first-come-first-served" basis.[70]

78. *Rule*. As proposed in the *Notice*, we will resolve mutually exclusive applications by substituting frequencies and giving highest priority to translator applicants proposing fill-in service of the commonly owned primary station. In those instances where frequencies are unavailable, we continue to believe that use of the priority system for choosing among mutually exclusive applications for FM station allotments (with the exception of criterion number three) is best suited for resolving conflicts among translator applicants promptly. In addition, the priority system accurately orders public interest concerns to be considered in choosing among mutually exclusive applications for translator licensees. We believe our priority system should assign a high priority to translator applicants proposing fill-in service. One of an FM translator's primary functions is to fill in "dead spots," and thus such services should be given priority over other applications. Finally, in those rare instances where the above criteria do not resolve the mutual exclusivity, we will select applications using a first-come-first-served method.

Definition of major change

79. The rules define a major change for FM translator stations as any change in output frequency (output channel), or authorized principal community, or area of service.[71] In the *Notice* we proposed to define "major change" as a proposed change of coverage area of more than ten percent of the previously authorized 1 mV/m contour,[72] or a change in frequency. All other changes would be considered minor changes including a change in the authorized principal community. We noted that this proposal would apply to both fill-in and other area translators. We also asked whether the ten percent change in coverage area is too restrictive, and whether a reduction in coverage of more than ten percent should be considered a major change. We also asked whether standards are needed to clarify the manner in which the relevant coverage change should be measured.

80. *Comments*. Cowan supports the existing rule while McKenzie supports the Commission's proposal. Other commenters indicate that the 10% level is too restrictive for defining a major change, and suggest appropriate modifications. NPR states that the definition for major changes in translator operations should be the same as those for the FM primary stations, requiring at least 50 percent change in the predicted 1 mV/m coverage area. NPR agrees that the intent of the proposed rule -- to discourage modifications to adjacent markets -- is necessary, but expresses concern that the specific actions may ultimately become cumbersome for routine service adjustments following unanticipated changes in growth patterns in local communities. Such changes could easily exceed 10 percent of predicted coverages and may unnecessarily burden FCC resources. Other commenters also indicate that higher change levels are necessary, with specific proposals ranging from 20 percent to 75 percent, including the ECS proposal that a 20 percent decrease should also be considered a minor change. Finally, some of these proposals measure the major change according to percent of population change rather than change in geographic coverage area.

81. TBA urges the Commission to consider any extension of translator coverage area into the protected contour of an existing full service station as a major change. CBS states that all applications should be considered relative to the FM translator's original authorization in order to avoid consecutive minor changes which ultimately amount to a major change. NAB states that the definition of "major change" should include a change of principal community and primary station being rebroadcast.[73] According to NAB, our proposed modification would create internal inconsistency with respect to the present "need" standard, as translator applicants who successfully applied by showing need for service to one community could subsequently change community of service without demonstrating similar need. NAB also states that this problem in conjunction with the lack of public complaint following changes in coverage area could degenerate into inadequate interference protection for FM stations. Finally, since the change of output channel (frequency) is considered a major change, NAB suggests that a change of input channel (primary station) should be afforded parallel status.[74]

82. *Rule*. We believe that a "major" change for FM translator stations should be defined as any change in output frequency (output channel), or any change[75] or increase (but not decrease) in 1 mV/m coverage area of

more than 10 percent of the previously authorized coverage contour.[76] We believe it is appropriate to give licensees some flexibility to make certain facility changes without triggering the "major change" process. We reject the suggestions of several commenters that we adopt a cut-off that is higher. We believe that a higher cut-off could cause abuse as it would enable FM translator licensees to increase their coverage area significantly without being subject to competing applications or public comment.

83. We decline to adopt "change in population" criteria as espoused by some commenters. Population studies are more complex, expensive, and therefore burdensome for applicants than analyses based on geographic areas. NAB's proposal to include a change in principal community as a major change would not be a useful revision because FM translators are not always licensed to serve specific communities and have no coverage or service requirements. As for NAB's reference to a change in input channel or primary station as a criterion, our new ownership and financial support rules will remove both the incentive and opportunity for changes in a primary station that would require special attention. Furthermore, since FM translators are a reception service, we find that it is unnecessary to review the programming the translator rebroadcasts. Finally, we believe that our new rule resolves TBA's concerns that an extension of coverage area into the protected contour of an existing broadcast station should be treated as a major change. Because the new rule limits "minor" change coverage area movements to 10 percent, TBA's concern is unwarranted since no significant encroachment upon another station's contour could likely occur without application of the procedural safeguards provided by the rules for "major" change.

Multiple ownership limits

84. Under existing rules, FM translators do not count against multiple ownership limits.[77] We stated in the *Notice* that it is reasonable to continue to exclude the ownership of FM translators for purposes of the multiple ownership rules in all cases. We also proposed to continue to exempt FM translators from the radio "contour overlap" rule, which prohibits the common ownership of two or more commercial radio stations in the same broadcast service in the same geographic area.[78]

85. *Comments*. Several broadcast interests support the Commission's proposal to continue to exclude FM translators from the multiple ownership rules.[79] NAB suggests, however, that the FCC impose local, if not national, multiple ownership rules for FM translators. NAB expresses concern that multiple ownership could prompt overwhelming development of secondary services in some communities, particularly given the FCC proposal to allow FM translator use of the 80 commercial channels. NAB also states that the FCC might also consider placing a limit on the number of co-owned translators with service contour overlap.[80]

86. *Rule*. We find no compelling reason to apply multiple ownership limits on the number and location of translators a single party can own and/or operate. Translators are established where there is a need to supplement the service provided by FM radio broadcast stations, and restrictions on multiple ownership could impede the delivery of necessary service to the public. We emphasize that translators are authorized on a secondary basis and are subject to displacement by FM radio broadcast stations. Consequently, it does not appear reasonable to impose multiple ownership restrictions on translators given that significant concentrations of the facilities are less likely to occur in any particular area under the constraints of the rules.

Cross-service translating

87. The current rules preclude an FM translator from rebroadcasting the signal of any station other than that of an FM radio broadcast station or FM translator.[81] We proposed in the *Notice* to retain the current rule precluding an FM translator from rebroadcasting AM signals.

88. *Comments*. Among the few commenters who address this issue, most agree with NAB that AM signals should not be rebroadcast, especially in light of the FCC's attempts to improve AM broadcasting conditions.[82] AFCCE concurs with the FCC's position but would support nighttime fill-in service by FM translators of AM daytime stations on a limited or temporary basis. Alternatively, McKenzie opposes the FCC proposal on the grounds that AM stations may not be able to serve entire counties in mountainous regions. Therefore, FM translators may accomplish service that AM radio is technically unable to provide.[83] Furthermore, MPR states that many NCE-FM licensees broadcast on the AM band because of the scarcity of spectrum space in many urban areas, and should be permitted to extend their service through the use of FM translators.

89. *Rule*. We continue to have serious reservations that actual improvements in AM service could be gained by allowing FM translators to rebroadcast AM stations in fill-in and other areas. We are conducting proceedings to improve the quality of AM radio service and to enhance the opportunities and incentives for such stations to compete in the marketplace via the existing band and new spectrum.[84] We believe that the fundamental problems of AM radio -- channel congestion, interference, and low fidelity receivers -- will be resolved by this concerted effort with the broadcasting community and radio manufacturers, apart from further consideration of cross-service translating. In addition, the groundwave propagation characteristics of AM signals are such that they normally do no leave service voids or "shadowing" (i.e., holes in coverage) similar to the "shadowing" found in the FM band, although licensees may desire to supplement coverage in directional antenna nulls. Thus, there is generally no reason for AM licensees to establish fill-in service facilities on the FM band. Indeed, policies authorizing FM translators to rebroadcast AM signals may exacerbate the fundamental problems of the service, rather than ameliorate them. Therefore, we believe that to approve the general use of FM translators by AM stations would contravene the goals of our AM improvement action.

TECHNICAL ISSUES

Frequencies available to FM translators

90. The existing rules authorize commercial FM translators to use the 20 channels of the FM broadcast band formerly authorized for Class A stations. NCE-FM translators may use these 20 channels and the 20 channels reserved for noncommercial use (Channels 201-220).[85] In the *Notice*, we proposed to allow commercial FM translators to operate on all 80 non-reserved commercial channels (Channels 221-300). We also proposed to permit NCE-FM translators to use these 80 channels and the 20

channels reserved for noncommercial use. We sought comment on ways to alleviate the expected impact that expanded channel availability will have on the time needed to dispose of applications tendered for filing and whether FM radio broadcast stations should be allowed to use first adjacent channels for fill-in translator service.

91. *Comments*. Several commenters urge the Commission to retain the existing rules restricting commercial FM translators to operation only on the 20 channels formerly authorized for Class A operations.[86] NAB doubts that unserved areas suffer spectrum congestion that impairs the public's ability to receive FM broadcast services. NAB disagrees with our analysis that the proposed expansion of available frequencies would not create an interference problem because the contour protection provision "is based upon outdated, inaccurate and/or imprecise technical assumptions that need a current and comprehensive review." NAB, among other parties, has requested this review in their "Petitioners' Statement of Consensus and Joint Supplement to Petitions for Reconsideration," filed in MM Docket No. 87-121, on May 11, 1990, at 7. Until such a review is completed, and the technical assumptions underlying contour protection are updated, NAB urges that we proceed cautiously and maintain the current restriction. TBA is concerned that the greater availability of frequencies will enable commercial translator operators to serve large areas using multiple translators. Kneller argues that the FM band is already "reeling" from the "AM-ization" caused by the 640 plus BC Docket No. 80-90 drop-ins and by upgrades of Class A's to B's and C's, and it should not be "degraded" further by a secondary service which provides no community service, local news or information to the areas outside the primary station's protected contour. KPBX opposes our proposal because it believes it would have an economically damaging effect on many NCE-FM stations.

92. Many commenters support the FCC proposal.[87] AFCCE contends that the proposed expansion of available channels would offer opportunities for additional FM translators, hence minimizing the potential for interference. Also, several commenters with public broadcasting interests[88] request that NCE-FM translators have specific access to the 80 non-reserved channels. Moody further suggests that NCE-FM translators applying to use these expanded channels should not be required to demonstrate that reserved-band FM channels are unavailable. McKenzie and MSTV support NCE-FM translator use of the non-reserved band because it reduces the chance of interference to TV Channel 6 stations.

93. FM Technology, Jones, and WTI support the use of first adjacent channels for fill-in translator service. NAB does not object as long as operations are consistent with the interference limitations proposed in the proceeding. AFCCE indicates that use of first, second, or third adjacent channel operation should be allowed for fill-in translator service, provided that no substantial actual interference is caused to the primary FM station within the station's principal community. Christian Media believes that translators should be permitted to use second and third adjacent channels. Seven Ranges states that the use of the primary station's second and third adjacent channels for translators has many advantages for fill-in translators, but urges the Commission to exclude first adjacent translators.

94. *Rule*. Much has changed since 1970, when we limited commercial FM translators to the use of the 20 Class A channels. Growth in the demand for FM service led us to permit Class A FM broadcast stations to operate on all 80 channels of the commercial frequency band.[89] That growth is still evident in the flow of petitions to amend the FM Table of Allotments and FM station applications. Furthermore, we are adopting other rules today which we believe will effectively prevent interference from FM translators. Consequently, we will allow all FM translators to operate on any of the 80 non-reserved commercial channels (with the 20 reserved noncommercial educational channels remaining available for NCE-FM translators' use as well).[90] We expect this decision to reduce the number of actual interference problems we face, including interference to TV stations operating on Channel 6, since the wider range of channels from which to choose often will allow applicants to choose channels on which the margin of predicted interference protection is greater. Finally we have decided to follow the approach we use for FM booster stations with respect to fill-in translator operation on the first, second or third adjacent channel to the primary station. We will authorize such translators if they meet interference protection standards to all other stations and if their operation is not predicted to create interference to the primary station within its principal community.

Maximum power output

95. Currently, power limits for FM translator operation are based on a transmitter power output (TPO) standard. FM translator stations located east of the Mississippi River or south of a line at 40 degrees North Latitude in California, are limited to a TPO of 1 watt. The maximum permissible TPO for FM translators located in all other areas is 10 watts.[91]

96. In the *Notice* we proposed to change our standards regarding maximum power from TPO values to effective radiated power (ERP) values. As distinct from TPO, a known ERP from an antenna of a given height yields a unique contour which can be used to predict coverage and interference. We proposed a 1 kW ERP limit for all FM translators, with no additional restrictions needed for fill-in translators because our other proposals would restrict their coverage area.[92] For translators serving other areas, we also proposed that the distance from their transmitting antenna to their predicted 1 mV/m contour may not exceed 16 km (approximately 10 miles)[93] in any direction. We stated that applicants would be required to compute the antenna height above average terrain (HAAT) along each of 12 distinct evenly spaced radials, starting from true north. Along each radial the ERP would be such that the distance to the predicted 1 mV/m coverage contour would not exceed 16 kilometers. As a final matter, since higher powered stations are more likely to contribute to significant human exposure to radiofrequency (RF) radiation,[94] we proposed to amend Section 1.1307(b) of the Commission's rules to require FM translator stations operating with more than 10 watts ERP to consider the potential impact of RF radiation on the environment.

97. *Comments*. There is general support for the Commission proposal to limit ERP instead of TPO. However, ECS believes that changing from TPO values to ERP values would greatly limit coverage. ECS, Jones, and Tower suggest that the translator output power be limited

to 100 watts without regard to antennas, transmission lines or HAAT. The University of Utah (Utah) states that increasing power would only increase interference to their repeater sites, with a concomitant decrease in service to the rural areas. Utah supports the current transmitter output power limit of 10 watts. NTA proposes a 10 watt antenna input power limit.

98. Many commenters[95] support the Commission's 1 kW maximum ERP proposal, including NJPBA which argues that 1 kW allows more meaningful coverage, especially in situations where very high antenna sites are not available. Cedar Ridge opposes any limit less than the proposed 1 kW limit unless existing translators are permanently grandfathered. McKenzie suggests that 1 kW ERP be a guideline maximum, but that all other pertinent factors that affect any particular area of the country be taken into account. McKenzie contends that a lesser maximum ERP, such as 100 watts, may be overly restrictive and the selection of ERP should be made by the applicant based on the power sufficient to provide adequate coverage. AFCCE is concerned that the ERP limit may not prevent a potential abuse where a station proposes much more power than is needed to provide fill-in service, and essentially provides its service on another channel to an area which already receives the primary signal. AFCCE wants the Commission to be careful not to permit the "warehousing" of frequencies or "stacking" of a station across the dial.

99. Alternative suggestions range from Christian Media's proposal for 3 kW maximum ERP down to NAB's proposal of a 10 watt/75 watt ERP limit east and west of the Mississippi River, respectively. Most comments in opposition considered the Commission proposal excessive.[96] CBS, NAB, MSTV and NTA cite the potential for increased interference. NAB strongly argues that 1 kW provides the framework for further abuse, and one of the major purposes of the proceeding is to eliminate abuses, not to accommodate them. NAB urges that our guiding principle should be service intended to provide localized coverage generally to unserved areas, and translators should be permitted only those power levels minimally needed to accomplish this objective. NAB claims that its lower proposed maximum ERP levels are used by the vast majority of existing translators. Feaster suggests that the Commission could give operators an option with regard to the proposed maximum power output or at least include a grandfather clause to prevent loss of service. CBS and du Treil contend that a translator should not have power in excess of the minimum for the class of their primary station and the 1 kW proposal is in excess of the minimum power permitted a Class A station (0.1 kW).

100. CBS proposes 10 watts ERP in the east and 100 watts ERP in the west. If the Commission wants ERP, NTA prefers 200 watts and would provide for liberal waivers up to 1 kW (without correction for HAAT) upon a showing that ERP is designed to cover a particular service area and is limited to the minimum ERP reasonably necessary to accomplish that coverage. du Treil proposes using rules parallel to the FM booster power limit and permitting a translator one percent of the maximum power for its class. Using this standard, FM translators rebroadcasting Class C and C1 stations could employ an ERP up to 1 kW; Class B and C2 limited to 0.5 kW; Class B1 and C3 stations limited to 0.25 kW; and Class A limited to 0.06 kW. Croghan believes a maximum radiation equivalent to 10 watts at 300 feet HAAT would be reasonable.

101. Corinthians XIII, a primary station licensee of fill-in translators, urges the Commission not to treat translators as second class stations in the Mexican Border area. Instead, they suggest that FM translator stations in the border area should be treated as if they were full service stations because they can meet the spacing distances required of Class A stations, but not the translator requirements. Corinthians XIII says the Commission does this with Class A stations now authorized 6 kW. Seven Ranges opposes the treaty limitation of 50 watts ERP near the Canadian border and proposes a case by case arrangement to allow higher power translators if the radiation towards Canada is suppressed. AFCCE urges the modification of Section 74.1235(i) to clearly state the ERP restrictions with respect to both Canadian and Mexican agreements, rather than depending on Public Notices and statements of Policy separate from the actual rules.

102. AFCCE, Capital Broadcasting *et al.*, Elving, Jones and Cedar Ridge support the Commission proposal regarding an ERP/HAAT tradeoff, or limit of 16 km maximum predicted 1 mV/m coverage distance for translators providing service to other areas. Cedar Ridge opposes any limit more restrictive than the proposed 16 km unless existing translators are permanently grandfathered. NAB argues the 16 km limit is grossly excessive, constituting a potential coverage area equal to 44 percent of a 3 kW, 100 meter Class A facility. NAB further contends that a Class A station could install multiple fill-in translators for the sole purpose of appearing at multiple frequencies in the FM band. NAB, with support expressed by ABA and Northland, suggests a 30-meter antenna height above average terrain limit resulting in a coverage limit of 5.2 km based on an ERP of 75 watts. CBS also recommends reducing its proposed maximum ERP for any HAAT in excess of 30 meters. On the other hand, Christian Media, ECS, FM Technology, WTI and Moody suggest generally larger coverage limits because 16 km is too restrictive. Others contend that certain circumstances, such as the widely separated population centers of the western plains states or the rugged terrain of the mountainous western states and Alaska, need provision for continued translator coverage beyond 16 km.[97]

103. Jones and NAB agree with the proposed maximum facilities prediction methodology (12 radials, each 30 degrees apart). du Treil, AFCCE and Vernier propose using the standard eight radials for HAAT calculations. AFCCE and du Treil indicate coverage and protection calculations for directional antennas require additional radials in the main lobes of a translator's directional antenna pattern, if the main lobes do not fall on one of the eight standard directions. AFCCE indicates these additional radials should not be taken into account for calculating HAAT, with HAAT calculated according to the procedure specified in Section 73.313 based on the evenly spaced radials. AFCCE suggests that translator contours should be based on the maximum ERP irrespective of polarization of signal used or antenna beam tilt employed. Vernier recommends that the Commission allow the applicant to average the HAAT of the eight cardinal radials and set the TPO to a level which produces no more than the maximum 1 mV/m signal.

104. NAB suggests that FM translators operating with 75 watts ERP or less should remain categorically exempt from the FCC regulations concerning the potential environmental impact from RF radiation as it relates to human exposure. AFCCE supports amendment of Section 1.1307(b) requiring translator stations employing 10 watts ERP or more to consider the potential of RF exposure effects on the environment. Jones suggests requiring statements regarding the potential impact of RF radiation. St. Clair believes the calculation of exposure to RF radiation is another requirement which is completely beyond the knowledge of rural translator operators, and suggests the requirement be limited to proposals where the transmitter power exceeds 100 watts.

105. *Rule*. In making our decision, we have sought to reconcile the role of translators as delivering broadcast signals to small service areas with the minimum necessary power, and the fact that a significant number of existing translators have been constructed more than 16 km from the area they are serving. We have decided to reduce our proposed maximum ERP standard and to provide criteria for the extent to service which, when combined with grandfathering discussed later in this document, should promote the primary purpose of the service while accommodating most existing authorized facilities.

106. The Commission is not persuaded by the comments that power levels above the current standard must result in increased interference. We continue to believe that the protection criteria we are adopting today will effectively control interference. The new standards create an equal probability of interference from translator stations operating at different powers by requiring higher power stations to be farther away from potentially affected stations. Having concluded that interference is not a factor in selecting the new maximum power limit, we have allowed for sufficient facilities to cover the locations traditionally served by translators. At the same time, we have incorporated a measure of flexibility with respect to ERP and distance to service contour to permit translator stations to meet the particular needs of individual areas while conforming to our rules.

107. We are setting 250 watts as the maximum ERP at which any FM translator may operate. The overwhelming majority of translators authorized under the 1 watt/10 watt TPO limits have ERP's of less than 250 watts. Very high gain transmitting antennas are needed to achieve an ERP of 250 watts from a TPO of 10 watts at the FM band frequencies. Therefore, we expect that virtually all operations with greater ERP would use higher transmitter powers than currently permitted. In that way, a higher maximum ERP limit would clearly represent an expansion of the traditional translator role. With the interference criteria we are adopting, we also have decided that it is reasonable to apply a 250 watt maximum ERP limit in all parts of the country, except for the border areas subject to bilateral agreements with Mexico and Canada.[98] Upon review of the comments and our own decisions establishing Commission requirements for environmental consideration of RF radiation, we have decided that the proper course in this area is to categorically exclude from the requirements for environmental assessment all applications requesting 100 watts ERP or less.[99] The modified environmental rule on RF radiation will apply to FM boosters as well as FM translators. In the *Notice*, we proposed to modify §1.1307 of our rules so that it covers both FM boosters and FM translators and it expresses the environmental consideration standard in terms of ERP instead of TPO. The 100 watts ERP standard we are adopting imposes less of a burden on applicants than the proposed 10 watts ERP standard.[100]

108. With respect to the coverage distance or HAAT limits, we will reduce the proposed limits by a small amount for areas west of the Mississippi River and by a large amount for areas in the east and southern California previously allowed 1 watt TPO. In order to enhance the distinction between maximum ERP determinations and protection calculations, we also are adopting a simplified procedure using tables instead of distance calculations. The tables allow ERP and HAAT combinations that produce 1 mV/m contour distances of 12.7 to 13.3 kilometers (km) in the west and 6.7 to 7.3 km in the east and southern California. An FM translator is allowed at least 10 watts ERP at any HAAT. This permits some extended coverage for stations at very high HAAT's (for example, at an HAAT of 800 meters, 1 mV/m coverage would extend 15.6 km). To illustrate, part of the table we are adopting for areas west of the Mississippi River, excluding southern California, follows:

Radial HAAT (meters)	Maximum ERP (MERP in watts)
less than or equal to 107	250
108 to 118	205
119 to 130	170
131 to 144	140
145 to 157	115
. . .	. . .
426 to 480	13
481 to 540	11
greater than or equal to 541	10

We recognize that situations exist where service to a greater distance would clearly serve the public interest without harm to any party. To address the most critical of such situations, we will be favorably disposed toward waiving this rule to permit higher power, up to 250 watts ERP at any HAAT, if an applicant demonstrates that the 1 mV/m coverage in the pertinent direction reaches only a white area (*i.e.*, beyond the protected contours of any full time aural service). For purposes of applying this waiver standard to NCE-FM translator applications, the Commission will consider any area that is not served by a full-service public radio station to be a white area (even if there is a full-service commercial station serving the area).

109. Our intention in specifying use of 12 radials to determine maximum ERP is to have an administratively workable determination that still provides for consideration of terrain variations. By choosing 12 radials for this purpose, the HAAT's determined for the calculations can also be used in coverage contour and protection requirement determinations, and the maximum power authorized will be based on a fairly broad sample of the terrain surrounding the transmitter site. In the preceding paragraph, we have identified an alternate method of determining maximum ERP and our rules will require this method to be used at the proposed 12 evenly spaced radials starting from True North. For azimuths that are not on one of the radials, the maximum ERP limit will be the MERP of the closest radial. We will not require or accept showings of higher or lower MERP values based on the terrain along intermediate radials. The adopted method, with its 12 required calculations should provide

adequate accuracy for the maximum power determinations. We emphasize, however, that protection standards will be applied without this 12 radial limit, so appropriate consideration will be given to intermediate radial heights and powers in that context.

Antennas (including standards for directional antennas)

110. The existing rules for licensing of multiple and composite antennas and the various forms of polarization are imprecise.[101] Section 74.1235(a)(2) specifies that multiple antennas are permissible as long as their radiation fields do not combine. We stated in the *Notice* that our proposal to use an ERP standard to set maximum power limits should cure any ambiguity in our rules concerning the licensing of multiple and composite antennas. The total radiated power in any direction from all antennas must not exceed the proposed ERP limit. With respect to dual or circularly polarized antennas, we proposed that the ERP/distance limit would apply equally to both the horizontally and vertically polarized components.

111. The current rules do not otherwise address the use of directional antennas by FM translators, and therefore do not include standards.[102] In the *Notice*, we proposed to codify the use of directional antennas by FM translator stations and to impose standards for such use. We further proposed that applicants seeking to use directional antennas for translator service would need to include information specified in Section 73.316 of the rules as part of their applications demonstrating conformance with the rules. We also proposed to require the applicant to address the impact of its proposal on nearby existing or proposed AM, FM and TV broadcast antennas.

112. *Comments*. AFCCE, Corinthians XIII, du Treil, FM Technology and Jones support the Commission's proposals regarding multiple and composite antennas. CBS supports retention of our existing rules for licensing these antennas. WTI asserts that any antenna system should be allowed as long as the station is constructed so the area within its 1 mV/m contour does not exceed the area of a circle with a 16 km radius.

113. Although some express reservations or request clarifications, several commenters support the Commission's directional antenna proposals.[103] Given the pending reconsideration of the decision in MM Docket No. 87-121 where numerous parties urge the Commission to refine the provisions of Section 73.317, NAB and ABES suggest that the Commission incorporate whatever final action it adopts in MM Docket No. 87-121. AFCCE clarifies that it supports proposed Section 74.1235(e) which states that applications must comply only with Section 73.316(c)(1) through (3), which would not impose the antenna maximum-to-minimum ratio or radiation pattern azimuth rate of change requirements of Section 73.316(b)(1) and (2) on FM translators.[104]

114. WTI suggests that an applicant should supply the information specified in Section 73.316 only if it seeks authorization for a translator facility that would otherwise be short spaced. NPR proposes that Section 73.316 should apply to situations posing the greatest risk of interference, such as when power levels exceed some predetermined limit (such as 500 watts ERP), or where a proposed translator facility requests a coverage pattern to avoid a prohibited Section 73.509 overlap. St. Clair believes that requiring compliance with all the subsections of Section 73.316 would be unduly burdensome and, in particular, opposes including the requirements of Section 73.316(d) in the FM translators rules. Vernier states that the rules should allow for the use of inexpensive directional antennas in order for translator service to remain a reasonable investment for stations. He further suggests that maximum-to-minimum radiation should be allowed to approach 24 dB for measured patterns and that the Commission should work with antenna manufacturers to develop a number of approved, low cost, off the shelf, directional antennas that can be used reliably in translator installations. McKenzie, Alaska, Temple, Corinthians XIII and Jones state that Section 73.316 of the rules would excessively burden both applicants as well as the Commission, and imposition of the standards is unwarranted.

115. *Rule*. In conjunction with our new ERP limits and predicted interference contour overlap standards, it is important that we have specific information about each composite antenna, multiple antenna array and directional antenna system that is being employed. At the same time, we recognize the need to minimize the burden on FM translator licensees. We believe the appropriate course is to adopt the proposed rules, essentially as written. These rules do not require FM translator directional antennas to meet the FM maximum-to-minimum radiation or the rate of change restrictions specified in Section 73.316(b) of the rules. The remaining rules should not be unduly burdensome. Moreover, the full antenna pattern description requirement is necessary not only for determining protection of other currently authorized stations but also to determine protection of the requested facilities from subsequently authorized translators.[105]

Interference criteria

116. Under the current rules, FM translators must not cause either predicted or actual interference to the public's direct reception of any authorized FM radio broadcast station.[106] Predicted interference is an application processing standard, currently based on Section 73.509 of the Commission's rules. Actual interference that is the result of broadcast operation must be corrected, or the FM translator station must suspend operation until it can be corrected.

117. In the *Notice* we proposed to adopt Section 73.509 standards to predict interference from FM translators, except commercial Class B and B1 stations would be protected to their predicted 0.5 mV/m and 0.7 mV/m contours, respectively. We proposed an absolute prohibition on a translator's causing actual interference to a broadcast transmission. For actual interference to the reception of service, we proposed to adopt the "significant number of complaints" standard we have found effective in resolving cases of interference for FM boosters.[107] We also proposed protection of existing FM translators from both predicted and actual interference caused by subsequently authorized FM translators.

118. *Comments*. Many commenters support the proposal to predict interference with Section 74.1203 standards based on Section 73.509.[108] Most other commenters support the adoption of some predicted interference criteria but disagree with specifics. Jones asserts translator-to-translator interference can be remedied by acknowledging the right of the first translator as the "protected one". McKenzie agrees with the Commission's statement that existing translator interference protection standards are sufficient for resolving problems.

119. CBS and NAB strongly support the intent of proposed Section 74.1203(e) not to grant translator authorizations where the translator is likely to interfere with the reception of a regularly received off-the-air service, even in an area where predicted field strength contour overlap does not occur. On the other hand, AFCCE is concerned that proposed Section 74.1203(e) will preclude some non-interference, non-overlap situations and thus artificially restrict translator service based on fear of interference in a populous area. AFCCE suggests relying on the "actual" interference standard for this situation.

120. Vernier and WTI support the proposed Section 74.1203(a) note, which would allow showings regarding population and terrain factors that minimize the impact of the predicted interference. Temple suggests that lack of population be defined as the predicted interference area not containing over 500 persons or 0.1 percent of the affected station's total service population, whichever is the lesser value. However, NPR and Pleasant consider these two proposed "escape clauses" to be inappropriate for the secondary translator service. NPR suggests that the absence of population in a given interference zone today may not be accurate in the near future. NPR is also concerned that while the premise of intervening terrain affecting interference is sound, the complexity of evaluating the claims outweighs the potential benefits. NPR argues that the Commission should maintain its longstanding policy that applicants are not permitted to "poke holes," theoretical or actual, in the 1 mV/m coverage areas of existing FM facilities so that the public is assured uninterrupted service.

121. Capital Broadcasting *et al.* and Jones suggest that an FM translator applicant should be required to submit contour maps with its application evidencing compliance. La Tour suggests a simpler method, using separation standards based on the predicted contours, except for applications involving directional antennas or terrain differentials, which could be required to plot contours. La Tour is concerned that rules which increase the complexity, and thereby the cost, of an application will diminish the ability of a translator to survive economically. Columbia also requests that we allow simplifying assumptions, such as determining height above lowest terrain using nearby river elevations, as a conservative substitute for a detailed radial study, to enable participation by groups with limited technical means.

122. AFCCE is concerned because the rules do not describe the precision with which the interfering or protected contours must be predicted in order to assure lack of overlap. NAB supports calculating protection along 12 radials, but urges that we also permit supplemental showings of other radials that may encompass terrain features that depart from the 12 radial minimum. NAB suggests that pleadings challenging an applicant's showing of non-interference be permitted to demonstrate their claims using these supplemental showings.

123. On miscellaneous matters relating to predicted interference, AFCCE requests clarification of proposed Section 74.1203(c), which it claims is confusing if it is intended to deal with creation of new interference and misworded if it is intended to deal with existing interference. Capital Broadcasting *et al.* agree that the Commission should continue to prohibit absolutely interference to the transmission of the signal of an FM station, but also suggest the Commission clarify the procedures to be followed when a primary FM station relocates its antenna, resulting in a new field strength contour overlap with an FM translator station. La Tour states that a translator should be protected from interference from upgrades of stations licensed to communities more than 75 miles away. FM Technology requests that the Commission be explicit about grounds for waiving restrictions. KSOR provides information supporting its assertion that some interference results from poor equipment design or maintenance practices and not from spectrum assignments.

124. Generally, NAB and other commenters[109] contend that our proposed "significant number of complaints" standard for determining actual interference is a nebulous, unreliable way of assessing interference, which is ultimately too lenient because listeners do not complain.[110] NPR contends that the Commission's experience with this standard for boosters is very limited and does not provide adequate support. NPR requests actual interference be limited to complaints arising within the predicted 34 dBu contour of the listener's desired station. Vernier also contends that the Commission's proposal would be easier to support if we defined a field strength point below which complaints would not be considered.

125. ABES suggests imposing a reasonable burden of proof on the complaining FM broadcast licensee, although the full service FM station would not need to show that it is actually listened to by any particular number of listeners in the alleged interference area. CBS requests that the burden of proof on full service broadcasters not be too great as it is hard to obtain affidavits from listeners. CBS suggests the Commission accept an affidavit from appropriate station personnel attesting to the number of complaints received or other evidence, which could be affidavits stating the experience of the station's technical personnel or consultants with the interference, or a substantial decline in the station's audience in the affected area occurring reasonably contemporaneously with the commencement of translator operations.

126. WTI proposes defining actual interference in terms of a 20 dB desired-to-undesired ratio for co-channel operations and a measured desired station field strength at a fixed receiving location of more than 10 uV/m (not protecting mobile receivers). WTI would also protect preexisting FM translators from interference complaints by new Channel 6 TV translators and low power TV stations.

127. NJPBA supports using "significant number of complaints" in Section 74.1203 rather than what it considers to be a very nebulous existing standard found in current Section 74.1203(a). Christian Media argues that "significant number" is ambiguous and suggests picking a specific number such as 50. Capital Broadcasting *et al.* suggest that unless any interference caused by a translator would have to be resolved, the translator station would have to cease operating.

128. *Rule.* There is general support for the proposed contour overlap method of predicting interference, and we will adopt it essentially as proposed.[111] We recognize the concern expressed regarding the proposed population and terrain exceptions, but we expect that the provision will be used very rarely due to our decision today on available frequencies. The note in the rule, along with Section 74.1203(e), will allow the processing staff to take special circumstances into account when they are brought to the staff's attention. This processing flexibility is consistent with our decision regarding conflicting applications and we believe it is appropriate for this secondary service that will still be subject to our prohibition on actual

interference. Therefore, an FM translator applicant may demonstrate that, despite predicted contour overlap, interference will not in fact occur due to such factors as absence of population in the overlap area or mountainous terrain. By the same token, pursuant to Section 74.1204(f), we will not grant an application if an objecting party provides convincing evidence that the proposed translator station would be likely to interfere with the reception of a regularly received off-the-air existing service, even if there is no predicted prohibited overlap.

129. We have decided not to require applicants to include an exhibit showing compliance with the predicted interference standards. The standards will be applied during processing and applications that do not comply will be dismissed. With that warning, we leave it to applicants to decide the level of analysis they will apply to determine the facilities they will request. We will also not specify a degree of precision for determining contours and predicting interference. In the event of objections or uncertainty as to contour location, as many radials as is necessary must be used. We will slightly modify other proposed language in Sections 74.1203 and 74.1204 to clarify its meaning.

130. We are unpersuaded that a translator station is entitled to protection against an FM radio broadcast station or that the translator should be able to cause interference to an FM station or a TV Channel 6 station if the translator was in existence first. The absence of such an entitlement is a fundamental characteristic of the secondary nature of translator service.

131. We believe it is inappropriate and unnecessary to introduce explicit standards for determining whether actual interference exists. We have modified the proposed rule to make it clear that we expect FM translator licensees to attempt to resolve all interference complaints by appropriate means. We have not included the significant number of complaints language in the rule we are adopting. Instead, when convinced that a complaint or complaints of uncorrected interference are valid, the Commission will direct an FM translator station to discontinue operation. This judgment will depend upon the individual circumstances presented in each situation.

TV Channel 6 Interference

132. *Proposal*. The existing rules provide no specific guidelines for evaluation of predicted interference caused to TV Channel 6 stations by NCE-FM translator stations operating on the reserved band. In the *Notice*, we proposed two methods for evaluating this potential interference that would apply to fill-in as well as other area translators. For predicted interference, we proposed a distance separation table. The distances were from Section 73.525 of the rules, where they are currently used to determine Channel 6 TV stations that are potentially affected by an NCE-FM application. We also proposed that any FM translator interference determinations pursuant to the Section 73.525 procedures should be done without consideration of population or need. For cases of actual interference, we proposed to require the translator to cease operation if there are a "significant number of complaints" that cannot be resolved by modification of the translator station's operations.

133. We also asked commenters to consider the feasibility of adopting a less stringent standard. We recognized that several other factors could be incorporated, including use of different polarizations, the relatively low power of translators, terrain shielding and population distribution. The signals radiated by most TV stations are horizontally polarized,[112] while the signals of NCE-FM translators may be vertically polarized only. This could greatly reduce the potential for interference. The potential for interference would be further reduced by adoption of the proposed ERP standard since this will make it easier to predict accurately the areas actually covered by FM translators. Also, since FM translators are not required to place any particular field strength contour over the community or area they propose to serve, applicants could use intervening terrain features to shield the Channel 6 service area. If this approach were favorably received, we proposed to accept an application for an NCE-FM translator unless circumstances suggest possible interference to Channel 6 signals, such as where the TV signal is elliptical or circularly polarized and the translator would be located in a populated area within the TV station's predicted Grade B contour. Where interference is theoretically conceivable we would require the translator applicant to demonstrate conclusively that the proposed translator would not cause interference to the reception of the Channel 6 TV signal. During any test periods the translator would be required to cease operation if any interference is caused.

134. *Comments*. There is general support for the direction of the Commission's proposals, but considerable confusion over their details. Only Moody and Seven Ranges felt that additional objective standards in this area were not necessary. Moody contends there is no evidence of interference complaints and describes the Commission proposal as classic overkill. Corinthians XIII, Feaster, and McKenzie support our alternative proposal to apply less restrictive standards to determine if interference will exist to Channel 6 TV stations from a proposed new NCE-FM translator. McKenzie believes that the problem will be minimized by opening all 100 FM channels to NCE-FM translator use.

135. Commenters presented a variety of ways to clarify the proposed requirements. Nearly all would modify the distance table to reflect the low power allowed translator stations. Most also suggest prohibiting the overlap of an explicitly defined FM translator interfering contour with a TV Channel 6 station's Grade B contour.[113] Christian Media, NPR, WTI and Vernier support providing for vertical polarization. CBS and Great American *et al.* oppose any such provision. A couple of parties propose more restrictive requirements. Great American *et al.* propose protection to TV Channel 6 service beyond a station's Grade B contour. du Treil suggests protecting low power TV stations on Channel 6. AFCCE, NJPBA and Vernier suggest greater use of Section 73.525. Conversely, Great American *et al.*, Jones and NPR argue against it. NPR contends that under Section 73.525, unless more than 3000 people are affected, there is no objectionable interference. Great American *et al.* claim that, as FM translators are a secondary service, interference to even one person should not be allowed. NPR suggests that we rely on field tests to determine where interference will be caused. Similarly, La Tour suggests that a more appropriate approach is to use only the actual interference criteria. MSTV opposes using field tests to determine interference and argues that an effective screening standard is essential.

136. CBS, Great American *et al.*, and MSTV oppose the significant number of complaints standard for determining actual Channel 6 interference. CBS suggests the docu-

mentation standards it proposed for FM actual interference. Great American *et al.* suggest an interference standard requiring the Commission's receipt of any "valid and substantial complaint" demonstrating the interference. At the least, Great American *et al.* urge the Commission to make clear the approximate number of complaints that it will consider "significant", and suggest 5-10. NJPBA suggests the significant number standard apply to translators on channels 221-300 and to those on the reserved channels outside the predicted Grade B contour of a TV Channel 6 station.

137. *Rule*. We believe that standards are necessary to remove the uncertainty regarding the extent to which TV Channel 6 reception is protected from interference that could be caused by FM translator stations. Standards are appropriate now that we are adopting limits on FM translator ERP and other interference protection criteria. We have decided to prohibit contour overlap between the predicted interference contours of NCE-FM translators on channels 201 through 220 and the predicted Grade B contours of TV stations operating on Channel 6. FM translators operating on these channels must remain outside the TV Channel 6 stations' Grade B contours to avoid potential interference. The standards for protection ratios are consistent with the NCE-FM broadcast station rules. We expect these criteria to be administratively workable and not excessively burdensome since additional channels are being made available for NCE-FM translator use. Accordingly, we have derived a replacement for the proposed distance separation table based on the maximum facilities limits adopted here, and produced an additional table, derived from the Grade B protection ratios used for Section 73.525 interference prediction. If an FM translator application proposes a site within the appropriate distance in the first table, then the second table must be used to determine if prohibited overlap with a TV Channel 6 Grade B contour is predicted. The TV Channel 6 actual interference complaint standard will be the same as discussed in the preceding section for FM actual interference.

OTHER MATTERS

Grandfathering criteria for existing translators

138. We stated in the *Notice* that we wished to consider a number of alternatives with respect to the regulatory treatment of existing translators following our adoption of new or revised translator service rules. These alternatives included requiring compliance: (1) with all new rules ultimately adopted as a result of this proceeding, granting waivers where needed; (2) with only the new technical rules; (3) within 5 years, at which time the old rules would sunset; (4) at the next renewal cycle; or (5) with the new technical rules when applying for modifications to the existing authorization. We further proposed that pending, non-mutually exclusive applications should be processed under any new rules that are adopted as a result of this *Notice*.[114]

139. *Comments*. NAB states that the Commission should strictly enforce an anti-grandfathering policy. Every translator should be required, following a period of not greater than 60 days, to either cease operation or comply with the new technical standards. For non-technical operation, NAB contends that the Commission should generally oppose any grandfathering. However, NAB states that there may be limited situations where strict, anti-grandfathering rules may not inure to the public benefit. For FM translator stations owned or funded by primary stations that have existed for over a decade NAB states that the Commission might consider adopting a waiver policy that would allow certain of these much older translators to continue operation under current ownership and direct funding mechanisms, but would require full compliance with more stringent interference protection rules. NAB also argues that primary station-operated or funded translators providing service to white areas should be allowed to continue operation under these existing relationships. However, NAB believes that upon the institution of new, full-service FM radio broadcast operations providing coverage, or new AM primary daytime service area coverage, such translators would then lose their grandfather status.[115]

140. La Tour, as well as a few other commenters, particularly those currently operating FM translators, favor complete grandfathering of existing facilities on the grounds of significant "sunk" investments in translator equipment as well as substantial audiences. Commenters that favor grandfathering underscore that these investments and successful cultivation of listeners occurred under the existing translator rules and "in good faith" that such rules were the legitimate basis for long term decisions. Furthermore, these commenters argue that a Commission decision reversing prior rules would cause significant damage to existing operators, potentially causing discontinued service to the public.[116]

141. Some commenters offer grandfathering positions in between these two extremes. du Treil, for example, states that translators should be required to comply with the new technical rules only when requesting modifications to their existing authorizations,[117] or when a change to an FM station results in the station receiving interference from an existing translator. Alternatively, Corinthians XIII as well as a few other commenters propose that FM translators should have a grace period to comply with new technical rules, which should last from one to five years. Corinthians XIII also urges that FM translators which have been providing service for many years should be allowed to continue to do so even though they might not comply with the proposed new non-technical rules. Other commenters suggest a different grace period apply for any new service rules. The suggestions range from one year to permanent grandfathering.

142. *Rule*. We note that requiring translators to come into compliance with new technical rules could cause licensees to withdraw service from areas currently served, a result contrary to the public interest. At the same time we wish to ensure that existing translators do not cause interference to FM radio broadcast stations. We believe that most translators are already in compliance with the technical rules we are adopting. If an existing FM translator station is not in compliance with some aspects of the new technical rules, but is not causing interference to the regular reception of any broadcast signal, we conclude that the public interest does not require the immediate modification of that facility simply to satisfy the new rule requirements. Thus, stations authorized prior to the effective date of these rules may continue to operate even if they do not comply with the technical rules set forth in the new Sections 74.1204, 74.1205, and 74.1235, provided that they comply with the interference rules in Section 74.1203. Moreover, if an interference problem comes to

our attention, or the station seeks to modify its facilities, we will then require compliance with the technical rules in Section 74.1204.

143. We believe that existing FM translator operations should not be permanently exempt from the application of the new service rules. The original purpose of FM translators is to provide supplementary service to areas in which direct reception of radio broadcast stations is unsatisfactory due to distance or intervening terrain barriers. A decision to permanently grandfather existing operations would undermine this purpose. Also, permanent exemption would create two "classes" of translators to which different rules would apply. We believe that the rules pertaining to existing FM translators would be inconsistent with those governing future FM translators.

144. The new service requirements for independently owned FM translators are, however, more stringent than those imposed by our earlier rules. For example, under the new rules commercial primary stations will not be permitted to provide financial support for independently owned translators located in other areas. We believe that because many FM translator licensees have limited financial means, service to the public could be unnecessarily disrupted if we were to require rapid compliance with these new rules. Existing FM translator operations will need some time to obtain alternative sources of funds. Therefore, we will require existing FM translator operations to come into compliance with the new service rules within three years of the effective date of these new rules. The Commission recognizes the limited resources of many FM translator licensees affected by the new rules and desires to refrain from imposing an extraordinary burden through the compliance process. Therefore, we will also entertain waivers for extended grandfathering periods for those licensees showing that the public would unduly lose service if compliance with the new service rules were required within three years. We emphasize that in showing a loss of service to the public, licensees should demonstrate their attempts to substitute other sources of financial support, the lack of availability of alternative funding, extraordinary cost structure concerns, as well as any other aural services available to the area.

Revised Rule Section

145. We stated in the *Notice* that with the numerous modifications to the existing translator rules proposed in this proceeding, it would also be appropriate to undertake a general revision of Part 74, Subpart L, of our rules governing the FM translator and booster services. We proposed to reorganize these rules to make them easier to apply and to clarify the language of the rules to avoid misinterpretation. We noted that the only substantive changes to the proposed rules set forth in Appendix B were those discussed in the *Notice* itself. Any other modifications in the proposed rules reflected only our desire to clarify this subpart.

146. *Comments*. WTI states provision should be made to allow Part 74 type acceptance for transmitters of any power.

147. *Rule*. As proposed in the *Notice*, we are taking this opportunity to clarify and reorganize some of our rules. In particular, we are adopting changes along the lines proposed for the transmitting equipment approval requirements, IF separation protection of FM broadcast stations, FM translator frequency tolerances and time of operation. At the same time, we are adopting clearer language on station identification, copies of the rules, emissions and bandwidth, purpose and permissible service, and eligibility and licensing requirements.

Other Matters

148. NAB states that in recent years it has become clear that the television translator service has been presenting similar problems as those experienced in the FM translator service. NAB concedes that the issue is more complicated, as the television translator service operates along with the low power television service. Nevertheless, they argue that the same alleged "abuses" that are the subject of this proceeding are also arising in the television translator service. NAB concludes that the alleged abuse should be considered seriously and the Commission should promptly adopt a notice of proposed rule making to eliminate these television translator abuses. Abuses in the television translator service to which NAB refers are beyond the scope of this proceeding and will not be addressed here. If NAB wishes to pursue this matter, it may file a petition for rule making in accordance with § 1.401 of the FCC's Rules.

ADMINISTRATIVE MATTERS

Final Regulatory Flexibility Analysis

I. Need and Purpose of this Action: The revision of the FM translator rules and policies adopted herein is necessary in order to promote the intended purposes of the FM translator service. There is a need to clarify and tighten several rules in order to ensure that FM radio broadcast stations are not adversely impacted by translator operations.

II. Summary of Issues raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis: La Tour states that the proposed rule changes may cause many FM translators to cease operating. La Tour states that all of these translator operators have gross annual revenues of less than 2.5 million dollars and are, therefore, small businesses. La Tour also believes that equipment manufacturers, some of them small businesses, will be put out of business; small market radio stations will be harmed if they cannot support a translator; and small businesses will also be harmed. Cowan urges the Commission to establish a small business exception. Specifically, Cowan suggests that translators with a power output of 10 watts or less should not be required to comply with any extensive engineering standards or showings.

III. Significant Alternatives Considered and Rejected: In this proceeding, the Commission examined the full range of options for FM translator service and paid careful attention to the effects of the various options on small entities. For example, to minimize burdens on applicants, we have decided not to require applications to include an exhibit showing compliance with the predicted interference standards.

149. The Secretary shall cause a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small

Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

PAPERWORK REDUCTION ACT STATEMENT

150. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose new or modified requirements or burdens upon the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

151. Accordingly, IT IS ORDERED THAT pursuant to the authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, Parts 1, 73 and 74 of the Commission's rules and regulations ARE AMENDED as set forth in Appendix B below. These rules and regulations ARE EFFECTIVE **March 1, 1991.**

152. IT IS FURTHER ORDERED THAT the freeze on new commercial FM translator applications and major changes to existing commercial FM translators SHALL CONTINUE for 60 days after the effective date of these new rules and, THAT within sixty days thereafter, applicants with pending applications on file SHALL AMEND their applications to conform with the new rules.

153. IT IS FURTHER ORDERED THAT the request for waiver of Section 74.1231 of the Commission's Rules filed by Gerald A. Turro on July 28, 1989 IS DENIED.

154. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

155. For further information on this proceeding, contact James R. Coltharp, (202) 632-6302, or Gordon Godfrey, (202) 632-9660, Policy and Rules Division, Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

INITIAL COMMENTS

1. Alpine Broadcasting Corporation
2. Arizona Broadcasting Association
3. Association for Broadcast Engineering Standards, Inc.
4. Association of Federal Communications Consulting Engineers
5. Association for Maximum Service Television
6. Brill Media Company, LP.
7. Joint comments of Capitol Broadcasting Corporation, Infinity Broadcasting Corporation, L.M. Communications, Inc., L.M. Communications of South Carolina, Inc., Shamrock Broadcasting, Inc., South Fork Broadcasting Corporation, and WAHR, Inc.
8. CBS, Inc.
9. Cedar Ridge Children's Home and School, Inc.
10. Christian Media Associates, Inc.
11. Columbia Bible College Broadcasting Company
12. Terry A. Cowan
13. Corinthians XIII Broadcasting Company, Inc.
14. Bill Croghan
15. du Treil, Lundin & Rackley, Inc.
16. Electronic Communication Service
17. Bruce F. Elving, Ph.D.
18. David W. Feaster
19. FM Technology Associates, Inc.
20. Joint comments of Great American Television and Radio Company, Inc. and McGraw-Hill Broadcasting Company, Inc.
21. Dan Hendrix
22. Hoffman Media of Louisiana, Inc.
23. Robert A. Jones, P.E.
24. K-BEST
25. KBUR/KGRS
26. King Broadcasting, Inc.
27. Kneller Broadcasting of Charlotte County., Inc.
28. KPBX Spokane Public Radio
29. KRXV, Inc.
30. KSOR (FM) Southern Oregon State College
31. KSPK
32. John S. La Tour
33. London Bridge Broadcasting, Inc.
34. Lotus Communications Corporation
35. M B C Grand Broadcasting, Inc.
36. Michael A. McKenzie
37. Minnesota Public Radio
38. Moody Bible Institute of Chicago
39. Mosaic Development Company
40. National Association of Broadcasters
41. National Public Radio
42. National Translator Association
43. New Jersey Broadcasters Association
44. New Jersey Public Broadcasting Authority
45. New Life Christian Academy
46. Northland Broadcasting, Inc.
47. Pleasant Broadcasters
48. Prairie Broadcasting Company
49. Prescott Valley Broadcasting Company, Inc.
50. Radio South, Inc.
51. Dan Ransom
52. William Paxton Rogers
53. Seven Ranges Radio Co., Inc.
54. Byron W. St. Clair
55. Stereo Broadcasters, Inc.
56. Sunbelt Television, Inc.
57. Temple University of the Commonwealth System of Higher Education
58. Thomson Consumer Electronics, Inc.
59. Tower Communications
60. Tucson Broadcasters Association

61. Gerard A. Turro
62. The University of Alaska
63. The University of Utah
64. Douglas L. Vernier
65. Weiner Broadcasting, Inc.
66. Western Inspirational Broadcasters, Inc.
67. Western Translators, Inc.
68. Thurstan Williams
69. WTCX/WDNT

REPLY COMMENTS

1. Association for Maximum Service Television, Inc.
2. Capital Cities/ABC, Inc.
3. Communications Investment Corporation
4. Corporation for Public Broadcasting
5. Terry A. Cowan
6. Electronic Communication Service
7. David W. Feaster
8. Freedom WLNE-TV Inc., WRGB Broadcasting Inc., and Freedom-TV Sub Inc.
9. Dan Hendrix
10. KBBU-FM
11. Klimek Communications Corp.
12. KSBY, Inc. and Gillett Communications of Milwaukee, Inc.
13. John S. La Tour/J and J Broadcasting/Power Du Pree Broadcasting Corporation
14. M B C Grand Broadcasting, Inc.
15. Moody Bible Institute of Chicago
16. National Association of Broadcasters
17. National Public Radio
18. National Translator Association
19. Temple University
20. Gerard A. Turro

LATE-FILED COMMENTS

1. du Treil, Lundin & Rackley, Inc.

APPENDIX B

Rule Changes

Title 47 CFR Parts 1, 73, and 74 are amended as follows:

1. The authority citation for Parts 1, 73, and 74 continues to read as follows:

Authority: 47 U.S.C. 154 and 303

2. Section 1.1307, paragraph (b), is amended by revising Note 1 to read as follows:

§ 1.1307 Actions which may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

* * * * *

(b) * * *

NOTE 1: Paragraph (b) shall apply to facilities and operations licensed or authorized under the following Parts of the Commission's Rules: 5, 21 (Subpart K), 25, 73, 74 (Subparts A, G, I, and L), and 80. With respect to Part 21 (Subpart K) and Part 74 (Subpart I), paragraph (b) is applicable only to MDS and ITFS stations transmitting with an equivalent isotropically radiated power (EIRP) in excess of 200 watts. With respect to Part 74 (Subpart L), paragraph (b) is applicable only to FM booster and translator stations transmitting with an effective radiated power (ERP) in excess of 100 watts. With respect to Part 80, paragraph (b) is applicable only to ship earth stations. Facilities and operations licensed or authorized under all other parts, subparts, or sections of the Commission's Rules shall be categorically excluded from consideration under paragraph (b).

* * * * *

3. Section 73.3573 is amended by revising the section heading, by removing the fourth sentence in paragraph (a)(1), by redesignating the Note at the end of the section as Note 1, and by adding a Note 2, to read as follows:

§ 73.3573 Processing FM broadcast station applications.

(a) * * *

(1) * * * Other requests for change in frequency or community of license for FM stations must first be submitted in the form of a petition for Rule Making to amend the Table of Allotments. For noncommercial educational FM stations a major change is any change in frequency or community of license or any change in power or antenna location or height above average terrain (or combination thereof) which would result in a change of 50 percent or more in the area within the station's predicted 1 mV/m field strength contour. * * *

* * * * *

Note 1: Processing of applications for new low power educational FM applications:

* * * * *

Note 2: For rules on processing FM translator and booster stations, see Section 74.1233 of this chapter.

4. Section 74.501 is amended by revising paragraph (b) to read as follows:

§ 74.501 Classes of *aural broadcast auxiliary* stations.

* * * * *

(b) Aural broadcast intercity relay station. A fixed station for the transmission of aural program material between radio broadcast stations, other than international broadcast stations, between FM radio stations and FM translator stations operating within the coverage contour of their commercial primary FM stations, between FM radio stations and their co-owned FM booster stations, or for such other purposes as authorized in § 74.531.

* * * * *

5. Section 74.531 is amended by redesignating paragraphs (c) through (g) as (d) through (h) and adding new paragraph (c) to read as follows:

§ 74.531 Permissible service.

* * * * *

(c) An aural broadcast intercity relay station is authorized to transmit aural program material between an FM radio station and an FM translator station operating within the coverage contour of its commercial primary FM station. This use shall not interfere with or otherwise preclude use of these broadcast auxiliary stations transmitting aural programming between the studio and transmitter location of a broadcast station or between broadcast stations as provided in paragraphs (a) and (b) above.

* * * * *

6. Section 74.532 is amended by revising paragraph (a) to read as follows:

§ 74.532 Licensing requirements.

(a) An aural broadcast STL or intercity relay station will be licensed only to the licensee or licensees of broadcast stations, other than international broadcast stations, and for use by a broadcast station or an FM booster station owned entirely by or under common control of the licensee or licensees, or for use by an FM translator station operating within the coverage contour of the commercial primary FM station being rebroadcast.

* * * * *

7. Section 74.1201 is amended by adding paragraphs (g), (h) and (i) to read as follows:

§ 74.1201 Definitions.

* * * * *

(g) Translator coverage contour. The coverage contour for an FM translator providing "fill in" service is congruent with its parent station: for a fill in translator for a commercial Class B station it is the predicted 0.5 mV/m field strength contour; for a fill in translator for a commercial Class B1 station it is the predicted 0.7 mV/m field strength contour; and for a fill in translator for all other classes of commercial stations as well as all noncommercial educational stations it is the predicted 1 mV/m field strength contour. A fill in FM translator's coverage contour must be contained within the primary station's coverage contour. The protected contour for an FM translator station is its predicted 1 mV/m contour.

(h) Fill in area. The area where the coverage contour of an FM translator or booster station is within the protected contour of the associated primary station (*i.e.*, predicted 0.5 mV/m contour for commercial Class B stations, predicted 0.7 mV/m contour for commercial Class B1 stations, and predicted 1 mV/m contour for all other classes of stations).

(i) Other area. The area where the coverage contour of an FM translator station extends beyond the protected contour of the primary station (*i.e.*, predicted 0.5 mV/m contour for commercial Class B stations, predicted 0.7 mV/m contour for commercial Class B1 stations, and predicted 1 mV/m contour for all other classes of stations).

8. Section 74.1202 is amended by revising paragraphs (b), (b)(1) and (b)(2); by removing paragraphs (c), (d) and the Note to this section; and by redesignating paragraph (e) as paragraph (c) to read as follows:

§ 74.1202 Frequency assignment.

* * * * *

(b) Subject to compliance with all the requirements of this subpart, FM broadcast translators may be authorized to operate on the following FM channels, regardless of whether they are assigned for local use in the FM Table of Allotments (§ 73.202(b) of this chapter):

(1) Commercial FM translators: Channels 221-300 as identified in § 73.201 of this chapter. (2) Noncommercial FM translators: Channels 201-300 as identified in § 73.201 of this chapter. Use of reserved channels 201-220 is subject to the restrictions specified in § 73.501 of this chapter.

* * * * *

(c) An FM broadcast booster station will be assigned the channel assigned to its primary station.

9. Section 74.1203 is revised to read as follows:

§ 74.1203 Interference.

(a) An authorized FM translator or booster station will not be permitted to continue to operate if it causes any actual interference to:

(1) the transmission of any authorized broadcast station; or

(2) the reception of the input signal of any TV translator, TV booster, FM translator or FM booster station; or

(3) the direct reception by the public of the off-the-air signals of any authorized broadcast station including TV Channel 6 stations, Class D (secondary) noncommercial educational FM stations, and previously authorized and operating FM translators and FM booster stations. Interference will be considered to occur whenever reception of a regularly used signal is impaired by the signals radiated by the FM translator or booster station, regardless of the quality of such reception, the strength of the signal so used, or the channel on which the protected signal is transmitted.

(b) If interference cannot be promptly eliminated by the application of suitable techniques, operation of the offending FM translator or booster station shall be suspended and shall not be resumed until the interference has been eliminated. Short test transmissions may be made during the period of suspended operation to check the efficacy of remedial measures. If a complainant refuses to permit the FM translator or booster licensee to apply remedial techniques which demonstrably will eliminate the interference without impairment to the original

reception, the licensee of the FM translator or booster station is absolved of further responsibility for that complaint.

(c) An FM booster station will be exempt from the provisions of paragraphs (a) and (b) of this section to the extent that it may cause limited interference to its primary station's signal, *provided* it does not disrupt the existing service of its primary station or cause such interference within the boundaries of the principal community of its primary station.

(d) A fill-in FM translator operating on the first, second or third adjacent channel to its primary station's channel will be exempt from the provisions of paragraphs (a) and (b) of this section to the extent that it may cause limited interference to its primary station's signal, *provided* it does not disrupt the existing service of its primary station or cause such interference within the boundaries of the principal community of its primary station.

(e) It shall be the responsibility of the licensee of an FM translator station or FM booster station to correct any condition of interference which results from the radiation of radio frequency energy by its equipment on any frequency outside the assigned channel. Upon notice by the Commission to the station licensee or operator that such interference is being caused, the operation of the translator station or booster station shall be immediately suspended and shall not be resumed until the interference has been eliminated or it can be demonstrated that the interference is not due to spurious emissions by the FM translator station or FM booster station: *provided*, however, that short test transmissions may be made during the period of suspended operation to check the efficacy of remedial measures.

10. A new Section 74.1204 is added to read as follows:

§ 74.1204 Protection of FM broadcast stations and FM translators.

(a) An application for an FM translator station will not be accepted for filing if the proposed operation would involve overlap of predicted field strength contours with any other authorized station, including commercial and noncommercial educational FM broadcast stations, FM translators and Class D (secondary) noncommercial educational FM stations, as set forth below:

(1) Commercial Class B FM Stations (Protected Contour: 0.5 mV/m)

Frequency separation	Interference contour of proposed translator station	Protected contour of commercial Class B station
Co-channel	0.05 mV/m (34 dBu)	0.5 mV/m (54 dBu)
200 kHz	0.25 mV/m (48 dBu)	0.5 mV/m (54 dBu)
400 kHz	5.00 mV/m (74 dBu)	0.5 mV/m (54 dBu)
600 kHz	50.0 mV/m (94 dBu)	0.5 mV/m (54 dBu)

(2) Commercial Class B1 FM Stations (Protected Contour: 0.7 mV/m)

Frequency separation	Interference contour of proposed translator station	Protected contour of commercial Class B1 station
Co-channel	0.07 mV/m (37 dBu)	0.7 mV/m (57 dBu)
200 kHz	0.35 mV/m (51 dBu)	0.7 mV/m (57 dBu)
400 kHz	7.00 mV/m (77 dBu)	0.7 mV/m (57 dBu)
600 kHz	70.0 mV/m (97 dBu)	0.7 mV/m (57 dBu)

(3) All Other Classes of FM Stations (Protected Contour: 1 mV/m)

Frequency separation	Interference contour of proposed translator station	Protected contour of any other station
Co-channel	0.1 mV/m (40 dBu)	1 mV/m (60 dBu)
200 kHz	0.5 mV/m (54 dBu)	1 mV/m (60 dBu)
400 kHz	10 mV/m (80 dBu)	1 mV/m (60 dBu)
600 kHz	100 mV/m (100 dBu)	1 mV/m (60 dBu)

(b) The following standards must be used to compute the distances to the pertinent contours:

(1) The distances to the protected contours are computed using Figure 1 of § 73.333 |F(50,50) curves| of this chapter.

(2) The distances to the interference contours are computed using Figure 1a of § 73.333 |F(50,10) curves| of this chapter. In the event that the distance to the contour is below 16 kilometers (approximately 10 miles), and therefore not covered by Figure 1a, curves in Figure 1 must be used.

(3) The effective radiated power (ERP) to be used is the maximum ERP of the main radiated lobe in the pertinent azimuthal direction. If the transmitting antenna is not horizontally polarized only, either the vertical component or the horizontal component of the ERP should be used, whichever is greater in the pertinent azimuthal direction.

(4) The antenna height to be used is the height of the radiation center above the average terrain along each pertinent radial, determined in accordance with § 73.313(d) of this chapter.

(c) An application for a change (other than a change in channel) in the authorized facilities of an FM translator station will be accepted even though overlap of field strength contours would occur with another station in an area where such overlap does not already exist, if:

(1) The total area of overlap with that station would not be increased;

(2) The area of overlap with any other station would not increase;

(3) The area of overlap does not move significantly closer to the station receiving the overlap; and,

(4) No area of overlap would be created with any station with which the overlap does not now exist.

(d) The provisions of this section concerning prohibited overlap will not apply where the area of such overlap lies entirely over water. In addition, an application otherwise precluded by this section will be accepted if it can be demonstrated that no actual interference will occur due to intervening terrain, lack of population or such other factors as may be applicable.

(e) The provisions of this section will not apply to overlap between a proposed fill-in FM translator station and its primary station operating on a first, second or

third adjacent channel, *provided* that such operation may not result in interference to the primary station within its principal community.

(f) An application for an FM translator station will not be accepted for filing even though the proposed operation would not involve overlap of field strength contours with any other station, as set forth in paragraph (a) of this section, if the predicted 1 mV/m field strength contour of the FM translator station will overlap a populated area already receiving a regularly used, off-the-air signal of any authorized co-channel, first, second or third adjacent channel broadcast station, including Class D (secondary) noncommercial educational FM stations and grant of the authorization will result in interference to the reception of such signal.

(g) An application for an FM translator station specifying a channel that is separated by 53 or 54 channels from the channel of an FM radio broadcast station will not be accepted for filing if it fails to meet the required separation distance set out in § 73.207 of this chapter. For purposes of determining compliance with § 73.207, translator stations will be treated as Class A stations; provided, however, that translator stations operating with 10 watts or less ERP will be treated as Class D stations and will not be subject to intermediate frequency separation requirements.

(h) An application for an FM translator station will not be accepted for filing if it specifies a location within 320 kilometers (approximately 199 miles) of either the Canadian or Mexican borders and it does not comply with § 74.1235(d) of this part.

(i) FM booster stations shall be subject to the requirement that the signal of any first adjacent channel station must exceed the signal of the booster station by 6 dB at all points within the protected contour of any first adjacent channel station, except that in the case of FM stations on adjacent channels at spacings that do not meet the minimum distance separations specified in § 73.207 of this chapter, the signal of any first adjacent channel station must exceed the signal of the booster by 6 dB at any point within the predicted interference free contour of the adjacent channel station.

(j) FM translator stations authorized prior to March 1, 1991 with facilities that do not comply with the predicted interference protection provisions of this section, may continue to operate, *provided* that operation is in conformance in § 74.1203 of this part regarding actual interference. Applications to modify such FM translator stations must specify facilities that comply with the provisions of this section.

11. A new Section 74.1205 is added to read as follows:

§ 74.1205 Protection of Channel 6 TV broadcast stations.

(a) An application for a construction permit for new or modified facilities for a noncommercial educational FM translator station operating on Channels 201-220 must include a showing that demonstrates compliance with paragraph (b), (c) or (d) of this section if it is within the following distances of a TV broadcast station which is authorized to operate on Channel 6.

FM Channel	Distance (kilometers)
201 . . .	. . . 148
202 . . .	. . . 146
203 . . .	. . . 143
204 . . .	. . . 141
205 . . .	. . . 140
206 . . .	. . . 137
207 . . .	. . . 135
208 . . .	. . . 135
209 . . .	. . . 135
210 . . .	. . . 135
211 . . .	. . . 135
212 . . .	. . . 135
213 . . .	. . . 135
214 . . .	. . . 134
215 . . .	. . . 134
216 . . .	. . . 133
217 . . .	. . . 133
218 . . .	. . . 132
219 . . .	. . . 132
220 . . .	. . . 131

(b) *Collocated Stations.* An application for a noncommercial educational FM translator station operating on Channels 201-220 and located at 0.4 kilometer (approximately 0.25 mile) or less from a TV Channel 6 station will be accepted if it includes a certification that the applicant has coordinated its antenna with the affected TV station.

(c) *Contour overlap.* Except as provided in paragraph (b) of this section, an application for a noncommercial educational FM translator station operating on Channels 201-220 will not be accepted if the proposed operation would involve overlap of its interference field strength contour with any TV Channel 6 station's Grade B contour, as set forth below.

(1) The distances to the TV Channel 6 station Grade B (47 dBu) field strength contour will be predicted according to the procedures specified in § 73.684 of this chapter, using the F(50,50) curves in § 73.699, Figure 9 of this chapter.

(2) The distances to the applicable noncommercial educational FM translator interference contour will be predicted according to the procedures specified in § 74.1204(b) of this part.

(3) The applicable noncommercial educational FM translator interference contours are as follows:

FM Channel	Interference Contour F(50, 10) curves (dBu)
201 . . .	. . . 54
202 . . .	. . . 56
203 . . .	. . . 59
204 . . .	. . . 62
205 . . .	. . . 64
206 . . .	. . . 69
207 . . .	. . . 73
208 . . .	. . . 73
209 . . .	. . . 73
210 . . .	. . . 73
211 . . .	. . . 73
212 . . .	. . . 74
213 . . .	. . . 75
214 . . .	. . . 77
215 . . .	. . . 78
216 . . .	. . . 80
217 . . .	. . . 81
218 . . .	. . . 85
219 . . .	. . . 88
220 . . .	. . . 90

(d) FM translator stations authorized prior to March 1, 1991 with facilities that do not comply with the predicted interference protection provisions of this section, may continue to operate, *provided* that operation is in conformance with § 74.1203 of this part regarding actual interference. Applications to modify such FM translator stations must specify facilities that comply with the provisions of this section.

12. Section 74.1231 is amended by revising paragraph (b) and adding an accompanying Note, revising paragraphs (c), (e), (g), and (h), and an accompanying Note to (h), and removing paragraph (i) to read as follows:

§ 74.1231 Purpose and permissible service

* * * * *

(b) An FM translator may be used for the purpose of retransmitting the signals of a primary FM radio broadcast station or another translator station which have been received directly through space, converted, and suitably amplified. However, a commercial FM translator providing fill-in service may use any terrestrial facilities to receive the signal that is being rebroadcast. An FM booster station or a noncommercial educational FM translator station operating on a reserved channel (Channel 201-220) and owned and operated by the licensee of the primary noncommercial educational FM station it rebroadcasts may use alternative signal delivery means, including, but not limited to, satellite and terrestrial microwave facilities. *Provided*, however, that an applicant for a noncommercial educational FM translator station operating on a reserved channel (Channel 201-220) and owned and operated by the licensee of the primary noncommercial educational FM station it rebroadcasts complies with either paragraph (b)(1) or (b)(2) of this section:

(1) The applicant demonstrates that:

(i) The transmitter site of the proposed FM translator station is within 80 kilometers of the predicted 1 mV/m contour of the primary station to be rebroadcast; or,

(ii) The transmitter site of the proposed FM translator station is more than 160 kilometers from the transmitter site of any authorized full service noncommercial educational FM station; or,

(iii) The application is mutually exclusive with an application containing the showing as required by § 74.1231(b)(2)(i) or (ii); or,

(iv) The application is filed after October 1, 1992.

(2) If the transmitter site of the proposed FM translator station is more than 80 kilometers from the predicted 1 mV/m contour of the primary station to be rebroadcast or is within 160 kilometers of the transmitter site of any authorized full service noncommercial educational FM station, the applicant must show that:

(i) An alternative frequency can be used at the same site as the proposed FM translator's transmitter location and can provide signal coverage to the same area encompassed by the applicant's proposed 1 mV/m contour; or,

(ii) An alternative frequency can be used at a different site and can provide signal coverage to the same area encompassed by the applicant's proposed 1 mV/m contour.

Note. For paragraphs 74.1231(b) and 74.1231(h), auxiliary intercity relay station frequencies may be used to deliver signals to FM translator and booster stations on a secondary basis only. Such use shall not interfere with or otherwise preclude use of these frequencies for transmitting aural programming between the studio and transmitter location of a broadcast station, or between broadcast stations, as provided in paragraphs 74.531(a) and (b). Prior to filing an application for an auxiliary intercity relay microwave frequency, the applicant shall notify the local frequency coordination committee, or, in the absence of a local frequency coordination committee, any licensees assigned the use of the proposed operating frequency in the intended location or area of operation.

(c) The transmissions of each FM translator or booster station shall be intended only for direct reception by the general public. An FM translator or booster shall not be operated *solely* for the purpose of relaying signals to one or more fixed received points for retransmission, distribution, or further relaying in order to establish a point-to-point FM radio relay system.

* * * * *

(e) An FM translator shall not deliberately retransmit the signals of any station other than the station it is authorized to retransmit. Precautions shall be taken to avoid unintentional retransmission of such other signals.

* * * * *

(g) The aural material transmitted as permitted in paragraph (f) of this section shall be limited to emergency warnings of imminent danger and to seeking or acknowledging financial support deemed necessary to the continued operation of the translator. Originations concerning financial support are limited to a total of 30 seconds an hour. Within this limitation the length of any particular announcement will be left to the discretion of the translator station licensee. Solicitations of contributions shall be limited to the defrayal of the costs of installation, operation and maintenance of the translator or acknowledgements of financial support for those purposes. Such acknowledgements may include identification of the contributors, the size or nature of the contributions and advertising messages of contributors. Emergency transmissions shall be no longer or more frequent than necessary to protect life and property.

(h) FM broadcast booster stations provide a means whereby the licensee of an FM broadcast station may provide service to areas in any region within the primary station's predicted, authorized service contours. An FM broadcast booster station is authorized to retransmit only the signals of its primary station which have been received directly through space and suitably amplified, or received by alternative signal delivery means including, but not limited to, satellite and terrestrial microwave facilities. The FM booster station shall not retransmit the signals of any other station nor make independent transmissions, except that locally generated signals may be used to excite the booster apparatus for the purpose of conducting tests and measurements essential to the proper installation and maintenance of the apparatus.

Note: In the case of an FM broadcast station authorized with facilities in excess of those specified by Section 73.211 of this chapter, an FM booster station will only be

authorized within the protected contour of the class of station being rebroadcast as predicted on the basis of the maximum powers and heights set forth in that section for the applicable class of FM broadcast station concerned.

13. Section 74.1232 is amended by revising paragraph (b) and adding a Note, by revising paragraph (d), removing the notes following paragraph (d), by redesignating paragraphs (e) through (g) as paragraphs (f) through (h), revising new paragraphs (f) through (h) and adding new paragraph (e) to read as follows:

§ 74.1232 Eligibility and licensing requirements.

* * * * *

(b) More than one FM translator may be licensed to the same applicant, whether or not such translators serve substantially the same area, upon an appropriate showing of technical need for such additional stations. FM translators are not counted as FM stations for the purpose of Section 73.3555, concerning multiple ownership.

Note: As used in this section need refers to the quality of the signal received and not to the programming content, format, or transmission needs of an area.

* * * * *

(d) An authorization for an FM translator whose coverage contour extends beyond the protected contour of the commercial primary station will not be granted to the licensee or permittee of a commercial FM radio broadcast station. Similarly, such authorization will not be granted to any person or entity having any interest whatsoever, or any connection with a primary FM station. Interested and connected parties extends to group owners, corporate parents, shareholders, officers, directors, employees, general and limited partners, family members and business associates. For the purposes of this paragraph, the protected contour of the primary station shall be defined as follows: the predicted 0.5 mV/m contour for commercial Class B stations, the predicted 0.7 mV/m contour for commercial Class B1 stations and the predicted 1 mV/m field strength contour for all other FM radio broadcast stations. The contours shall be as predicted in accordance with Section 73.313(a) through (d) of this chapter. In the case of an FM radio broadcast station authorized with facilities in excess of those specified by Section 73.211 of this chapter, a co-owned commercial FM translator station will only be authorized within the protected contour of the class of station being rebroadcast, as predicted on the basis of the maximum powers and heights set forth in that section for the applicable class of FM broadcast station concerned. An FM translator station in operation prior to March 1, 1991, which is owned by a commercial FM (primary) station and whose coverage contour extends beyond the protected contour of the primary station, may continue to be owned by such primary station until March 1, 1994. Thereafter, any such FM translator station must be owned by independent parties.

(e) An FM translator station whose coverage contour goes beyond the protected contour of the commercial primary station shall not receive any support, before or after construction, either directly or indirectly, from the commercial primary FM radio broadcast station. Such support also may not be received from any person or entity having any interest whatsoever, or any connection with the primary FM station. Interested and connected parties extends to group owners, corporate parents, shareholders, officers, directors, employees, general and limited partners, family members and business associates. Such an FM translator station may, however, receive technical assistance from the primary station to the extent of installing or repairing equipment or making adjustments to equipment to assure compliance with the terms of the translator station's construction permit and license. FM translator stations in operation prior to March 1, 1991 may continue to receive contributions or support from the commercial primary station for the operation and maintenance of the translator station until March 1, 1994. Thereafter, any such FM translator station shall be subject to the prohibitions on support contained in this section.

(f) An FM broadcast booster station will be authorized only to the licensee or permittee of the FM radio broadcast station whose signals the booster station will retransmit, to serve areas within the protected contour of the primary station, subject to Note, Section 74.1231(h).

(g) No numerical limit is placed upon the number of FM booster stations which may be licensed to a single licensee. A separate application is required for each FM booster station. FM broadcast booster stations are not counted as FM broadcast stations for the purposes of Section 73.5555 concerning multiple ownership.

(h) Any authorization for an FM translator station issued to an applicant described in paragraphs (d) and (e) of this section will be issued subject to the condition that it may be terminated at any time, upon not less than sixty (60) days written notice, where the circumstances in the community or area served are so altered as to have prohibited grant of the application had such circumstances existed at the time of its filing.

14. New Section 74.1233 is added to read as follows:

§ 74.1233 Processing FM translator and booster station applications.

(a) Applications for FM translator and booster stations are divided into two groups:

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. In the case of FM translator stations, a major change is any change in frequency (output channel), or change (only the gain should be included in determining amount of change) or increase (but not decrease) in area to be served greater than ten percent of the previously authorized 1 mV/m contour. All other changes will be considered minor. All major changes are subject to the provisions of Sections 73.3580 and 1.1104 of the rules pertaining to major changes.

(2) In the second group are applications for licenses and all other changes in the facilities of the authorized station.

(b) Applications for FM translator and booster stations will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically release a Public Notice listing applications which have been accepted for filing and announcing a date (not less than 30 days after publication)

on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and/or petitions to deny the listed applications must be filed.

(c) In the case of an application for an instrument of authorization, other than a license pursuant to a construction permit, grant will be based on the application, the pleadings filed, and such other matters that may be officially noticed. Before a grant can be made it must be determined that:

(1) There is not pending a mutually exclusive application filed in accordance with paragraph (b) of this section.

(2) The applicant is legally, technically, financially and otherwise qualified;

(3) The applicant is not in violation of any provisions of law, the FCC rules, or established policies of the FCC; and

(4) A grant of the application would otherwise serve the public interest, convenience and necessity.

(d) Applications for FM translator stations proposing to provide fill-in service (within the primary station's protected contour) of the commonly owned primary station will be given priority over all other applications.

(e) Where applications for FM translator stations are mutually exclusive and do not involve a proposal to provide fill-in service of a commonly owned primary station, the FCC may stipulate different frequencies as necessary for the applicants.

(f) Where there are no available frequencies to substitute for a mutually exclusive application, the FCC will base its decision on the following priorities: (1) first full-time aural service; (2) second full-time aural service; and (3) other public interest matters including, but not limited to the number of aural services received in the proposed service area, the need for or lack of public radio service, and other matters such as the relative size of the proposed communities and their growth rate.

(g) Where the procedures in paragraphs (d), (e) and (f) of this section fail to resolve the mutual exclusivity, the applications will be processed on a first-come-first-served basis.

15. Section 74.1235 is revised in its entirety to read as follows:

§ 74.1235 Power limitations and antenna systems.

(a) An application for an FM translator station filed by the licensee or permittee of the primary station to provide fill-in service within the primary station's coverage area will not be accepted for filing if it specifies an effective radiated power (ERP) which exceeds 250 watts.

(b) An application for an FM translator station, other than one for fill-in service which is covered in paragraph (a) of this section, will not be accepted for filing if it specifies an effective radiated power (ERP) which exceeds the maximum ERP (MERP) value determined in accordance with this paragraph. The antenna height above average terrain (HAAT) shall be determined in accordance with § 73.313(d) of this chapter for each of 12 distinct radials, with each radial spaced 30 degrees apart and with the bearing of the first radial being true north. Each radial HAAT value shall be rounded to the nearest meter. For each of the 12 radial directions, the MERP is the value corresponding to the calculated HAAT in the following table that is appropriate for the location of the translator. For an application specifying a nondirectional transmitting antenna, the specified ERP must not exceed the smallest of the 12 MERP's. For an application specifying a directional transmitting antenna, the ERP in each azimuthal direction must not exceed the MERP for the closest of the 12 radial directions.

(1) For FM translators located east of the Mississippi River or in Zone I-A as described in § 73.205(b) of this chapter:

Radial HAAT (meters)	Maximum ERP (MERP in watts)
less than or equal to 32	250
33 to 39	170
40 to 47	120
48 to 57	80
58 to 68	55
69 to 82	38
83 to 96	27
97 to 115	19
116 to 140	13
greater than or equal to 141	10

(2) For FM translators located in all other areas:

Radial HAAT (meters)	Maximum ERP (MERP in watts)
less than or equal to 107	250
108 to 118	205
119 to 130	170
131 to 144	140
145 to 157	115
158 to 173	92
174 to 192	75
193 to 212	62
213 to 235	50
236 to 260	41
261 to 285	34
286 to 310	28
311 to 345	23
346 to 380	19
381 to 425	15.5
426 to 480	13
481 to 540	11
greater than or equal to 541	10

(c) The effective radiated power of FM booster stations shall be limited such that the predicted service contour of such stations computed in accordance with § 73.313, paragraphs (a) - (d) of this chapter, may not extend beyond the area covered by the predicted service contour of the primary station that they rebroadcast and that such FM booster effective radiated power may not exceed 20 percent of the maximum allowable effective radiated power for the primary station's class.

(d) Applications for FM translator stations located within 320 km of the Canadian border will not be accepted if they specify more than 50 watts effective radiated power in any direction or have a 34 dBu interference contour, calculated in accordance with Section 74.1204 of this part,

that exceeds 32 km. FM translator stations located within 320 kilometers of the Mexican border must be separated from Mexican allotments and assignments in accordance with § 73.207(b)(3) of this chapter and are limited to a transmitter power output of 10 watts or less. For purposes of compliance with that section, FM translators will be considered as Class D FM stations.

(e) In no event shall a station authorized under this subpart be operated with a transmitter power output (TPO) in excess of the transmitter type-accepted rating. A station authorized under this subpart for a TPO that is less than its transmitter type-accepted rating shall determine its TPO in accordance with § 73.267 of this chapter and its TPO shall not be more than 105 percent of the authorized TPO.

(f) Composite antennas and antenna arrays may be used where the total ERP does not exceed the maximum determined in accordance with paragraph (a), (b) or (c) of this section.

(g) Either horizontal, vertical, circular or elliptical polarization may be used provided that the supplemental vertically polarized ERP required for circular or elliptical polarization does not exceed the ERP otherwise authorized. Either clockwise or counterclockwise rotation may be used. Separate transmitting antennas are permitted if both horizontal and vertical polarization is to be provided.

(h) All applications must comply with § 73.316, paragraphs (d)-(h) of this chapter.

(i) An application that specifies use of a directional antenna must comply with § 73.316, paragraphs (c)(1)-(c)(3) of this chapter. Prior to issuance of a license, the applicant must: 1) certify that the antenna is mounted in accordance with the specific instructions provided by the antenna manufacturer; and 2) certify that the antenna is mounted in the proper orientation. In instances where a directional antenna is proposed for the purpose of providing protection to another facility, a condition may be included in the construction permit requiring that before program tests are authorized, a permittee: 1) must submit the results of a complete proof-of-performance to establish the horizontal plane radiation patterns for both the horizontally and vertically polarized radiation components; and, 2) must certify that the relative field strength of neither the measured horizontally nor vertically polarized radiation component shall exceed at any azimuth the value indicated on the composite radiation pattern authorized by the construction permit.

(j) FM translator stations authorized prior to March 1, 1991, with facilities that do not comply with the ERP limitation of paragraph (a) or (b) of this section, as appropriate, may continue to operate, *provided* that operation is in conformance in § 74.1203 of this part regarding interference. Applications to modify such FM translator stations must specify facilities that comply with paragraph (a) or (b) of this section, as appropriate.

16. Section 74.1236 is amended by revising paragraph (a) to read as follows:

§ 74.1236 Emission and bandwidth.

(a) The license of a station authorized under this subpart allows the transmission of either F3 or other types of frequency modulation (see § 2.201) upon a showing of need, as long as the emission complies with the following:

* * * * *

17. Section 74.1237 is amended by revising paragraph (d) to read as follows:

§ 74.1237 Antenna location.

* * * * *

(d) The transmitting antenna of a commonly owned FM translator or booster station shall be located within the protected contour of its FM station, subject to Note, Section 74.1231(h).

18. Section 74.1250 is revised to read as follows:

§ 74.1250 Transmitters and associated equipment.

(a) FM translator and booster transmitting apparatus, and exciters employed to provide a locally generated and modulated input signal to translator and booster equipment, used by stations authorized under the provisions of this subpart must be type accepted or notified upon the request of any manufacturer of transmitters in accordance with this section and Subpart J of Part 2 of this chapter. If acceptable, the apparatus will be included in the FCC's "Radio Equipment List, Equipment Acceptable for Licensing." In addition, FM translator and booster stations may use FM broadcast transmitting apparatus notified or type accepted under the provisions of Part 73 of this chapter.

(b) Transmitting antennas, antennas used to receive signals to be rebroadcast, and transmission lines are not subject to the requirement for type acceptance.

(c) The following requirements must be met before translator, booster or exciter equipment will be notified or type accepted in accordance with this section:

(1) Radio frequency harmonics and spurious emissions must conform with the specifications of § 74.1236 of this part.

(2) The local oscillator or oscillators, including those in an exciter employed to provide a locally generated and modulated input signal to a translator or booster, when subjected to variations in ambient temperature between minus 30 degrees and plus 50 degrees centigrade, and in primary supply voltage between 85 percent and 115 percent of the rated value, shall be sufficiently stable to maintain the output center frequency within plus or minus 0.005 percent of the operating frequency and to enable conformance with the specifications of § 74.1261 of this part.

(3) The apparatus shall contain automatic circuits to maintain the power output in conformance with § 74.1235(e) of this part. If provision is included for adjusting the power output, then the normal operating constants shall be specified for operation at both the rated power output and the minimum power output at which the apparatus is designed to operate. The apparatus shall be equipped with suitable meters or meter jacks so that the operating constants can be measured while the apparatus is in operation.

(4) Apparatus rated for transmitter power output of more than 1 watt shall be equipped with automatic circuits to place it in a nonradiating condition when no input signal is being received in conformance with § 74.1263(b) and to transmit the call sign in conformance with § 74.1283(c)(2).

(5) For exciters, automatic means shall be provided for limiting the level of the audio frequency voltage applied to the modulator to ensure that a frequency swing in excess of 75 kHz will not occur under any condition of the modulation.

19. Section 74.1251 is amended by revising the section heading, revising paragraphs (b), (b)(7), (b)(8), removing paragraph (b)(9), and adding paragraph (c) to read as follows:

§ 74.1251 Technical and equipment modifications.

* * * * *

(b) Formal application on FCC Form 349 is required of all permittees and licensees for any of the following changes:

* * * * *

(7) Any change of authorized effective radiated power.

(8) Any change in area being served.

(c) Changes in the primary FM station being retransmitted must be submitted to the FCC in writing.

20. Section 74.1261 is revised to read as follows:

§ 74.1261 Frequency tolerance.

(a) The licensee of an FM translator or booster station with an authorized transmitter power output of 10 watts or less shall maintain the center frequency at the output of the translator within 0.01 percent of its assigned frequency.

(b) The licensee of an FM translator or booster station with an authorized transmitter power output greater than 10 watts shall maintain the center frequency at the output of the translator or booster station in compliance with the requirement of Section 73.1545(b)(1).

21. Section 74.1263 is revised to read as follows:

§ 74.1263 Time of operation.

(a) The licensee of an FM translator or booster station is not required to adhere to any regular schedule of operation. However, the licensee of an FM translator or booster station is expected to provide a dependable service to the extent that such is within its control and to avoid unwarranted interruptions to the service provided.

(b) An FM translator or booster station rebroadcasting the signal of a primary station shall not be permitted to radiate during extended periods when signals of the primary station are not being retransmitted.

(c) The licensee of an FM translator or booster station must notify the Commission of its intent to discontinue operations for 30 or more consecutive days. Notification must be made within 10 days of the time the station first discontinues operation and Commission approval must be obtained for such discontinued operation to continue beyond 30 days. The notification shall specify the causes of the discontinued operation and a projected date for the station's return to operation, substantiated by supporting documentation. If the projected date for the station's return to operation cannot be met, another notification and further request for discontinued operations must be submitted in conformance with the requirements of this section. Within 48 hours of the station's return to operation, the licensee must notify the Commission of such fact. All notification must be in writing.

(d) The licensee of an FM translator or booster station must notify the Commission of its intent to permanently discontinue operations at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

(e) Failure of an FM translator or booster station to operate for a period of 30 or more consecutive days, except for causes beyond the control of the licensee or as authorized pursuant to paragraph (c) of this section, shall be deemed evidence of permanent discontinuance of operation and the license of the station may be canceled at the discretion of the Commission.

22. Section 74.1269 is revised to read as follows:

§ 74.1269 Copies of rules.

The licensee or permittee of a station authorized under this subpart shall have a current copy of Volumes I (Parts 0, 1, 2 and 17) and III (Parts 73 & 74) of the Commission's Rules and shall make the same available for use by the operator in charge. Each such licensee or permittee shall be familiar with those rules relating to stations authorized under this subpart. Copies of the Commission's Rules may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

23. Section 74.1283 is revised to read as follows:

§ 74.1283 Station identification.

(a) The call sign of an FM broadcast translator station will consist of the initial letter K or W followed by the channel number assigned to the translator and two letters. The use of the initial letter will generally conform to the pattern used in the broadcast service. The two letter combinations following the channel number will be assigned in order and requests for the assignment of particular combinations of letters will not be considered.

(b) The call sign of an FM booster station will consist of the call sign of the primary station followed by the letters "FM" and the number of the booster station being authorized, *e.g.*, WFCCFM-1.

(c) A translator station authorized under this subpart shall be identified by one of the following methods.

(1) By arranging for the primary station whose station is being rebroadcast to identify the translator station by call sign and location. Three such identifications shall be made during each day: once between 7 a.m. and 9 a.m., once between 12:55 p.m. and 1:05 p.m. and once between 4 p.m. and 6 p.m. Stations which do not begin their broadcast before 9 a.m. shall make their first identification at the beginning of their broadcast days. The licensee of an FM translator whose station identification is made by the primary station must arrange for the primary station licensee to keep in its file, and available to FCC personnel, the translator's call letters and location, giving the name, address and telephone number of the licensee or his service representative to be contacted in the event of malfunction of the translator. It shall be the responsibility of the translator licensee to furnish current information to the primary station licensee for this purpose.

(2) By transmitting the call sign in International Morse Code at least once each hour. Transmitters of FM broadcast translator stations of more than 1 watt transmitter output power must be equipped with an automatic keying device that will transmit the call sign at least once each hour, unless there is in effect a firm agreement with the translator's primary station as provided in § 74.1283(c)(1). Transmission of the call sign can be accomplished by:

(i) Frequency shifting key; the carrier shift shall not be less than 5 kHz nor greater than 25 kHz.

(ii) Amplitude modulation of the FM carrier of at least 30% modulation. The audio frequency tone use shall not be within 200 hertz of the Emergency Broadcast System Attention signal alerting frequencies.

(d) FM broadcast booster stations shall be identified by their primary stations, by the broadcasting of the primary station's call signs and location, in accordance with the provisions of Section 73.1201 of this chapter.

(e) The Commission may, in its discretion, specify other methods of identification.

FOOTNOTES

[1] Currently, there are approximately 1,849 FM translators on-the-air. Construction permits have been granted for another 290 translators.

The current rules also recognize FM booster stations which receive, amplify and retransmit signals on the same frequencies as the FM radio broadcast station. Booster stations are authorized only to the licensee of the primary station they rebroadcast and afford a means whereby the licensee of a primary station may provide service to areas at low signal strength within its primary service contour. *See* 47 CFR § 74.1231(h). The Commission revised its FM booster rules to authorize higher power FM boosters and to permit them to rebroadcast signals received by any distribution technology the licensee deems suitable. *See Report and Order* in MM Docket No. 87-13, 2 FCC Rcd 4625 (1987). Other than clarifications in the booster rules necessitated by this *Report and Order*, we make no changes to the rules governing the FM booster service. *See* §§ 1.1307, 73.3573, 74.1202, 74.1203, 74.1204, 74.1231, 74.1232, 74.1233, 74.1235, 74.1237, 74.1250, 74.1261, 74.1263 and 74.1283.

[2] An FM radio broadcast station whose signal is rebroadcast by an FM translator is referred to as the "primary station." *See* 47 CFR § 74.1201(d).

[3] Recently, the rules were modified to permit licensees of noncommercial educational FM stations to use any distribution technology they deem suitable to transmit programming to their own translators operating on reserved channels subject to certain conditions. *See Report and Order* in MM Docket No. 86-112, 3 FCC Rcd 2196 (1988), *recon. granted in part, denied in part. Memorandum Opinion and Order* in MM Docket No. 86-112, FCC 89-216, 4 FCC Rcd 6459 (1989). *See also Further Notice of Proposed Rule Making* in MM Docket No. 86-112, 3 FCC Rcd 2202 (1988).

[4] *See Notice of Proposed Rule Making* in Docket No. 17159, 34 FR 761 (1969), *Report and Order* in Docket No. 17159, 20 Rad. Reg. 2d (P&F) 1538 (1970).

[5] 47 CFR § 74.1231(a).

[6] 20 Rad. Reg. 2d at 1541.

[7] The FM translator rules are set forth at 47 CFR §§ 74.1201-74.1284. The Commission has also issued a *Guide to FM Translator Rules and Policies* to emphasize the need for translator licensees and applicants to conform to the existing FM translator rules. *See Public Notice*, 55 Rad. Reg. 2d (P&F) 1247 (1984). *See* Note 47, *infra*.

[8] *Notice of Inquiry*, 3 FCC Rcd 3664 (1988).

[9] These petitions, and responsive comments to them, were discussed in detail in the *NOI*. *See* 3 FCC Rcd at 3665-3668.

[10] 5 FCC Rcd 2106 (1990).

[11] Appendix A lists parties commenting in this proceeding. du Treil, Lundin, & Rackley, Inc. filed late comments which we have accepted in the interest of compiling as complete a record as possible.

[12] The existing rule regarding the secondary status of FM translators requires that their operation not cause interference to any other broadcast station. *See* 47 CFR § 74.1203.

[13] The amended rules are set forth in Appendix B.

[14] 47 CFR § 74.1232(d).

[15] 20 Rad. Reg. 2d at 1541, para. 6.

[16] 47 CFR § 74.1232(d)(1).

[17] 20 Rad. Reg. 2d at 1541, para. 6.

[18] *See Report and Order* and *Memorandum Opinion and Order* in MM Docket No. 86-112, *supra*. The rules require that, during a three-year transition period, applicants for such NCE-FM translators proposing to use alternative signal delivery must demonstrate that an alternative frequency providing comparable coverage is available. Applicants need not make a showing if the proposed translator is either within 80 kilometers (50 miles) of the predicted 1 mV/m contour of the primary station or is greater than 160 kilometers (100 miles) from any NCE-FM station.

[19] The Commission's rules state that a translator license may be granted to "any qualified individual, organized group of individuals, or local civil government body" in addition to the licensee of an FM radio broadcast station. *See* 47 CFR § 74.1232(a). This category of licensee will be referred to as an "independent" party.

[20] 20 Rad. Reg. 2d (P&F) at 1541, para. 6.

[21] The commenters supporting the Commission's ownership proposal include NAB, du Treil, Kneller Broadcasting of Charlotte County, Inc. (Kneller), KSOR-FM Southern Oregon State College (KSOR), Northland Broadcasting, Inc. (Northland), Seven Ranges Radio Co. (Seven Ranges), Tower Communications (Tower), Douglas Vernier (Vernier), Western Translators, Inc. (WTI), Arizona Broadcasting Association (ABA), London Bridge Broadcasting, Inc. (London Bridge), CBS, Inc. (CBS), Moody Bible Institute of Chicago (Moody), Brill Media Company, LP. (Brill), and Joint Comments of Capital Broadcasting Corporation *et al.* Prairie Broadcasting Company (Prairie Broadcasting) states that the prohibition regarding primary station ownership of "other area" FM translators should extend to family members of the primary station licensee.

[22] Terry Cowan (Cowan) and Alpine Broadcasting Corporation (Alpine) support this aspect of the NAB proposal.

[23] NAB also suggests that the FCC consider, following adoption of new translator rules, permitting independently owned translators in fill-in and white areas only.

[24] Throughout this *Report and Order*, we will refer to these two classifications when one rule is not appropriate for both categories. When no classification is specified, the rule will be

for all translators. Further, we want to emphasize that under these revised rules, where the predicted coverage contour of a proposed commercial FM translator would serve an area that meets the fill-in definition in part and the other area definition in part, the primary station would be prohibited from translator ownership.

[25] The rules will also be amended to prohibit translator ownership by any person or entity having any interest or connection with the primary FM station. Interested and connected parties extend to group owners, corporate parents, shareholders, officers, directors, employees, general and limited partners, family members and business associates. Due to the potential for abuse, we intend for this provision to be broader than the Commission's general attribution rules.

[26] Consistent with the translator policies that have been in effect for the past two decades, we decline to adopt NPR's proposal to impose additional restrictions on independent party ownership of translators. We believe that the need to attract funding from listeners will adequately ensure responsiveness to consumers' preferences.

[27] A commercial primary station applying for an FM translator whose coverage area is partially fill-in but also extends into a "white area" should follow the "white area" waiver procedure by demonstrating a lack of service in the area beyond the primary station's coverage contour.

[28] 47 CFR § 74.1232(d)(2). We note that there is no prohibition against financial support by FM station licensees to independent parties for the construction, operation or maintenance of FM translators either within the primary station's 1 mV/m predicted contour or in areas where there is no predicted FM service.

[29] 47 CFR § 74.1232(d), Note 2.

[30] We did not propose to impose a financial support restriction on NCE-FM translators.

[31] CBS, ABA, TBA, New Jersey Public Broadcasting Authority (NJPBA), Bill Croghan (Croghan), du Treil, FM Technology Associates, Inc. (FM Technology), London Bridge, Robert A. Jones, P.E. (Jones), KRXV, Inc. (KRVX), and Vernier. In addition, Pleasant Broadcasters (Pleasant) states that financial support should be prohibited not only by an FM radio station but also by any person or entity having any interest whatsoever, or any connection with an FM station.

[32] Klimek Communications Corp. (Klimek) and Communications Investment Corporation (CIC) state that primary FM stations should be permitted to provide financial support to FM translators operating beyond their protected contours.

[33] Tower, MBC Grand Broadcasting, Inc. (MBC Grand), and KBBU-FM agree with NTA on this point. KBBU states that the Commission should permit local origination and advertisements on FM translators as an alternative to primary station support.

[34] Informal comment submitted into the record of this proceeding by R. Kent Parsons on behalf of Wayne, Piute, and Garfield counties in Utah.

[35] The rules will be amended to prohibit financial support to an "other area" translator by any person or entity having any interest or connection with the primary station. *See* Note 25, *supra*.

[36] Primary stations will still be permitted, however, to provide "technical assistance" to FM translators in other areas, to the extent of installing, repairing, or making adjustments to equipment to assure compliance with the terms of the translator station's construction permit or license. In this regard, technical assistance will be excepted from the indirect support proscription in our rule.

[37] We also believe the Commission has ample authority under Sections 4(i) and 303 to adopt rules limiting financial assistance to translators.

[38] 47 CFR § 74.1231(g).

[39] *Id.*

[40] *See Guide to FM Translator Rules and Policies*, 55 Rad. Reg. 2d (P&F) at 1248. This policy against profit-making from translator operation was not codified in the rules. We stated that any new rules we may adopt in this proceeding will, of course, supersede any guidelines set forth in the *Guide to FM Translator Rules and Policies*, *supra*. *See* n. 47, *infra*.

[41] *See* FCC Public Notice, FCC 86-161, April 11, 1986.

[42] CBS, London Bridge, ABA, du Treil, FM Technology, Kneller, and Sunbelt Television, Inc. (Sunbelt).

[43] Seven Ranges, Northland, Vernier, and ABA suggest that a standardized format for acknowledgements and solicitations should be established to prevent FM translator licensees from airing disguised commercials.

[44] Dan Hendrix, referenced above in comments by KBUR/KGRS, states that FM translators do not divert advertising revenues from full service stations because of their comparatively small listenership.

[45] WTI also asks that independently-owned fill-in translators should have access to fundraising to supplement any primary station support. We note that our rules prohibit commercial primary station support of "other area" translators, limit on-air solicitations to 30-seconds per hour, and restrict the kinds of announcements that can be made by NCE-FM translators, but impose no other restrictions on the fundraising ability of FM translator licensees.

[46] We also reject WTI and La Tour's proposal that translators be permitted to use multiplex subcarriers as a source of revenues in addition to charitable contributions. Translators are intended to rebroadcast signals into areas experiencing reception problems rather than to originate programming and information services. We believe that the subcarrier option would improperly establish FM translators as an origination service while also undermining incentives for broadcast stations to develop where financially viable.

[47] The guidelines set forth in the *Guide to FM Translator Rules and Policies*, *supra*, are superseded by the new rules adopted here. However, those existing translators eligible for "grandfathering" as discussed *infra*, will remain subject to the Policy Statement's provision stating that "translators may not make fundraising announcements for the purpose of making a profit." The non-profit aspect of the Policy Statement will be retained for three years following the effective date of the new rules, coinciding with the "grandfathering" section's similar parameter. We note that the new rules no longer require licensees of FM translators to operate non-profit facilities.

[48] *See* 47 CFR §§ 74.1201(a), 74.1231(a) and 74.1284(a).

[49] 47 CFR § 74.1231(g).

[50] 47 CFR § 74.1284(b). 47 U.S.C. § 325(a).

[51] Brill Media, Capital Broadcasting *et al.*, Cowan, du Treil, Bruce F. Elving, Ph.D. (Elving), New Jersey Broadcasters Association (NJBA), NJPBA, Kneller, McKenzie, Seven Ranges, Vernier, and Corinthians XIII Broadcasting Company, Inc. (Corinthians XIII), as well as others, categorically oppose authorizing program origination authority for FM translators. Pleasant states that the rules should expressly forbid the stripping out or introduction of subcarriers or other multiplex signals by the translator.

[52] We underscore the statutory requirement that an independently owned translator, providing fill-in service or service to other areas, must obtain the permission of the primary station to rebroadcast its programming. *See* 47 U.S.C. § 325(a).

[53] On July 28, 1989, Turro filed a request for waiver of Section 74.1231 of the Commission's Rules to permit his FM translator station to originate local programming. By Public Notice, DA 89-933, released August 3, 1989, the Commission requested comment on this waiver petition.

[54] *See FM Broadcast Rules (First Report and Order)*, 40 FCC 662, 664, 665 (1962); *AM Station Assignment Standards (NPRM)*, 25 Rad. Reg. (P & F) 1615, 1617-1618 (1963); *Cf. Pillar of Fire*, 2 FCC Rcd 519 (1987); *Plainview Radio*, 24 FCC 405, 421 (1958), citing *North Plains Broadcasting*, 7 Rad. Reg. (P & F) 93, 106a (1951).

[55] *See* 47 CFR §§ 74.1231(f) and (g).

[56] 47 CFR § 74.1231(b).

[57] *See Memorandum Opinion and Order* in MM Docket No. 86-112, *supra*. A proposal to expand this authority to independently owned NCE-FM translators is contained in the *Further Notice of Proposed Rule Making* in MM Docket No. 86-112, 3 FCC Rcd 2202 (1988).

[58] Association of Federal Communications Consulting Engineers (AFCCE), Brill, Cowan, CBS, Capital Broadcasting et al., Electronic Communication Service (ECS), FM Technology, Kneller, Northland, Seven Ranges, TBA, and Corinthians XIII are among the commenters supporting the Commission's proposal. KBBU supports the Commission's proposal and also recommends that all FM translators should be permitted to use terrestrial microwave transmission facilities.

[59] Proposals by NAB, NPR, and Temple that we revisit the NCE-FM satellite delivery authority decision made in MM Docket No. 86-112 are beyond the scope of this proceeding. Furthermore, the comments presented by NPR asking that we overturn the exception that permits NCE-FM translators owned by their primary stations to receive signals using any technical means do not offer any new substantive reasons to revisit the issue at this time.

We intend that our decisions herein not alter in any fashion the special treatment we accord Alaska. *Wrangell Radio Group*, 75 FCC 2d 404 (1980). Upon appropriate showing the Commission has accommodated Alaska's unique lack of adequate communications services by granting waivers allowing program origination, alternative signal delivery, and cross-service translating.

[60] *See* 47 CFR § 74.1231(b) and *Memorandum Opinion and Order* in MM Docket No. 86-112, *supra*. These frequencies are primarily available for aural intercity relay and studio transmitter links (STL) usage, but may be used on a secondary basis by FM booster stations and NCE-FM translator stations assigned to reserved channels and owned and operated by their primary station.

[61] Authorization on a secondary basis would mean that aural intercity relay frequencies could be used to deliver signals to FM translators only where such use would not interfere with or preclude the use of those channels by full service radio broadcast stations.

[62] 47 CFR § 74.1231(b) and (c).

[63] AFCCE, CBS, TBA, Corinthians XIII, du Treil, McKenzie, Seven Ranges, WTI and Vernier.

[64] 47 CFR § 74.1232(b).

[65] Supporting commenters include AFCCE, Seven Ranges, TBA, Jones, WTI, and McKenzie. AFCCE qualifies its support as it is opposed to multiple FM translators serving the same area on different frequencies carrying one station's signal.

[66] ABES and Capital Cities/ABC support this proposal.

[67] TBA offers a similar proposal.

[68] Comments submitted into the record of this proceeding by the Bureau of Economics of the United States Federal Trade Commission, August 15, 1988.

[69] *See* BC Docket No. 80-130, 90 FCC 2d 88 (1982). The Commission employs four criteria to compare proposals to amend the FM Table of Allotments. These criteria are: 1) first full-time aural service; 2) second full-time aural service; 3) first local service; and 4) other public interest matters. Consideration of "other public interest matters" includes the number of aural services received in the proposed service area, the number of local services, the need for or lack of public radio service and other matters such as the relative size of the proposed communities and their growth rate. We proposed to employ these criteria to evaluate mutually exclusive applications for FM translator stations, with the exception of the "local service" criterion. Since FM translators have no program origination authority, we stated that we would not consider whether an applicant will be providing a local service. Thus, we proposed that the third criterion would not be considered, and "the number of local services" would not be considered as one of the "other public interest matters."

[70] Jones states that the primary station should not receive a priority for translator licenses, and all applications should be processed on a first-come-first-served basis. This will prevent the licensee of a primary station from obtaining translator licenses in order to preclude competitive entry of other FM translators. Tower supports the idea that a lottery system should be used to grant FM translator licenses.

[71] 47 CFR § 73.3573(a)(1). As long as the community or area of service (some translator stations are licensed to rural areas with no defined communities) which was initially served continues to be served, and there is only an incidental expansion of service, a proposed modification has been interpreted as a "minor" change.

[72] This percentage cut-off to define a "major change" in area of coverage was first set forth in *Ted Tucker and Jana Tucker*, 4 FCC Rcd 2816 (1989) (*San Manuel, AZ*).

[73] Klimek opposes this proposal, stating that a change in primary station does not affect any of the technical characteristics of the FM translator and therefore should not be considered.

[74] Capital Cities/ABC also states that a change in primary station should be considered a major change.

[75] The Commission emphasizes that, in calculating coverage area changes for major change applications, only the gain area may be included in the measurement.

[76] In response to the comments expressing concern regarding the potential abuses through cumulative minor change applications, we believe that the review procedure in the existing application process in conjunction with the observations of competitors will adequately monitor excessive changes.

[77] *See* 47 CFR § 73.3555.

[78] *See First Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1723 (1989). The Commission modified the radio contour overlap rules so that common ownership of two or more commercial stations in the same broadcast service is prohibited if their principal city contours overlap -- *i.e.*, a 5 mV/m contour for AM stations and a 3.16 mV/m contour for FM stations.

Although the new rules continue to prohibit common ownership of two AM or two FM stations in the same community of license, they do permit dual ownership in some cases within the same ADI market. The revised rules are set forth at 47 CFR § 73.3555(a)(1) and (2).

[79] TBA, Seven Ranges, WTI, du Treil, FM Technology, Jones, and McKenzie.

[80] Capital Broadcasting Corporation *et al.* state that independent parties should not be permitted to own translators with overlapping or adjacent service areas.

[81] 47 CFR § 74.1284(c).

[82] du Treil, ABES, Byron W. St. Clair (St. Clair), and London Bridge.

[83] Klimek also opposes the Commission's proposal stating that AM stations would have added exposure and enhance program diversity if they were permitted to rebroadcast via an FM translator.

[84] *See Notice of Proposed Rule Making* in MM Docket No. 87-267, 2 FCC Rcd 5014 (1987); *Report and Order* in MM Docket No. 89-46 (Policies to Encourage Interference Reduction Between AM Broadcast Stations), 5 FCC Rcd 4492 (1990; and *Report and Order* in MM Docket No. 88-376 (Amendment of the Commission's Rules to Improve the Quality of the AM Broadcast Service by Reducing Adjacent Channel Interference and by Eliminating Restrictions Pertaining to the Protected Daytime Contour), 4 FCC Rcd 3835 (1989).

[85] 47 CFR §§ 74.1202(b)(1) and (2).

[86] NAB, CBS, ABA, TBA, KPBX, Northland and Kneller.

[87] Commenters supporting the Commission's proposal are Capital Broadcasting *et al.*, ABES, du Treil, Elving, David W. Feaster (Feaster), FM Technology, Corinthians XIII, Jones, Seven Ranges, St. Clair, NPR, Minnesota Public Radio (MPR), NJPBA, Moody, Temple, Association for Maximum Service Television (MSTV), McKenzie, Vernier, WTI, and AFCCE.

[88] NPR, MPR, NJPBA, Moody, MSTV, St. Clair, McKenzie, WTI and Temple.

[89] *See Report and Order* in BC Docket No. 80-90, 94 FCC 2d 152 (1983).

[90] Moody has requested that the Commission not require a showing of nonavailability of reserved-band channels. Current practices do not require such a showing and we will not impose one at this time.

[91] 47 CFR § 74.1235(a).

[92] Additionally, rules were proposed to advise applicants of further limits on the power of FM translators in the areas within 320 kilometers of either the Canadian or Mexican border.

[93] An ERP of 1 kW at 77 meters produces a 1 mV/m contour at 16 km based upon the FCC FM F(50,50) chart.

[94] *See Report and Order* in Gen. Docket No. 87-551, 3 FCC Rcd 7332 (1988), and *Erratum* in Gen. Docket No. 87-551, 4 FCC Rcd 1761 (1989).

[95] Supporting commenters include London Bridge, AFCCE, MPR, TBA, KSOR, Elving, McKenzie, Cedar Ridge Children's Home and School, Inc. (Cedar Ridge), Seven Ranges, Moody, La Tour, ABES, Capital Broadcasting *et al.*, and Corinthians XIII.

[96] CBS, NAB, NTA, du Treil, Croghan, WTI, Pleasant, Northland and Prairie.

[97] NPR, ABES, La Tour, The University of Alaska (Alaska), KPBX, Dan Ransom (Ransom), St. Clair, Vernier, and Western.

[98] We will discuss the border area proposals during upcoming meetings with the Canadian and Mexican governments. Any changes that are agreed upon will be reflected by an appropriate change in § 74.1235(d). In the meantime, individual situations will be evaluated on a case-by-case basis and, if necessary, referred to Canada or Mexico.

[99] Applicants proposing higher power must determine whether or not their facility would expose workers or the general public to excessive levels of RF radiation. A worst case calculation for a single 100 watts ERP source results in RF radiation exceeding the existing standard for human exposure within about 2 meters of the antenna. Assuming that FM translators will not be located where significant RF radiation is contributed by other stations and that the transmitting antennas are normally more than 2 meters from accessible locations, such exposure should not occur.

[100] It is also more consistent with the current rule, which is based on 10 watts TPO. Most FM boosters and translators use a transmitting antenna with sufficient gain to produce an ERP that is between two and ten times their TPO.

[101] 47 CFR §§ 74.1235 and 74.1250.

[102] 47 CFR § 74.1235.

[103] Those commenters supporting the directional antenna proposal were FM Technology, CBS, NAB, TBA, NJPBA, Moody, WTI, NPR, St. Clair and AFCCE.

[104] Moody concurs with AFCCE's position.

[105] Some of the rules are derived from FM broadcast station directional antenna rules adopted in MM Docket No. 87-121. Despite pending reconsideration petitions in that proceeding, we believe the rules we are adopting here will be adequate for this secondary service in which FM translator stations remain responsible for correcting any actual interference that may result from unpredicted directional antenna performance.

[106] *See* 47 CFR § 74.1203(a)-(d).

[107] *See Report and Order* in MM Docket No. 87-13, *supra*.

[108] CBS, Corinthians XIII, Moody, ABES, NAB, Brill Media, Feaster, Elving, Seven Ranges, Vernier, WTI, and Capital Broadcasting *et al.*

[109] Pleasant, McKenzie, du Treil, NPR, and ABES.

[110] NAB submitted a copy of its "interference complaint" study documenting its concern. *See* "Broadcast Technical Interference Complaint Survey: What Does the Public Do When They Experience Signal Interference?", R. V. Ducey, Research and Planning Department, NAB, June, 1987.

[111] To improve the organization of the new rules, we have rearranged them with actual interference in § 74.1203, predicted FM interference in § 74.1204 and predicted TV Channel 6 interference in § 74.1205. Thus, the proposed note to § 74.1203(a) is now part of § 74.1204(d) and the proposed § 74.1203(e) is now § 74.1204(f).

[112] 47 CFR Section 73.682(a)(14).

[113] Christian Media, du Treil, the Joint Comments of Great American Television and Radio Company, Inc. *et al.* (Great American *et al.*), MSTV, NAB, Thomson Consumer Electronics, Inc. (Thomson), and WTI.

[114] Upon adoption of the *NOI*, we imposed a freeze on applications for new commercial FM translators and major changes to authorized commercial FM translators. *See* 3 FCC Rcd at 3673. Applications for new NCE FM translators seeking assignment to the reserved frequency band were exempt from the freeze so that the revised noncommercial signal delivery technology rule could be given effect. *See Report and Order* in MM Docket No. 86-112, *supra*. We took this action because of our concern that the volume of applications for FM translators could increase substantially during the pendency of this proceeding. The freeze will continue for 60 days after the effective date of any new rules adopted and, thereafter, we will provide a

60 day period for applicants to amend their applications to conform with the new rules. We noted that if a pending modification application would become a "major change" under the new rules, applicants would be required to pay new processing fees in order for the Commission to process those applications.

[115] Several commenters generally support NAB's anti-grandfathering position. These commenters include Alpine, Brill Media, CBS, Capital Cities/ABC, ABA, TBA, Croghan, Northland, Prairie, Prescott Valley Broadcasting Company, Inc. (Prescott), Radio South, and London Bridge (which also specifically supports NAB's proposed "white area" exception). Pleasant supports grandfathering only primary station-owned translators of long-standing and translators providing service in white areas.

[116] Christian Media, Columbia Bible College, NPR, ECS, Elving, Feaster, MBC Grand and Moody Bible support permanent grandfathering of existing FM translator stations. AFCCE and Cowan state that existing FM translators should be grandfathered under the old rules, but should be made to come into conformance with the new rules if, at some future time, they cause any interference to a full-facility station. Hendrix suggests that translators licensed prior to the imposition of the freeze should continue under financial agreements permitted at the time of their licensing, and translator applications submitted during the freeze should be allowed five years to comply with the new rules.

[117] KSOR and Western Inspirational Broadcasters, Inc. (Western Inspirational) support this proposal. KBBU also expresses support for this grandfathering option if full grandfathering is unacceptable. WTI states that a translator should be grandfathered until it proposes to expand its population coverage area by more than 20 percent.

SEPARATE STATEMENT OF COMMISSIONER SHERRIE P. MARSHALL

In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations

I have no doubt that translators have the potential to undermine our FM allocations scheme. But in its efforts to protect against improper uses of FM translators, this decision goes too far and throws the baby out with the bathwater. Indeed, the effect of this decision may well be to deny the benefits of FM translator service to significant portions of rural America. Thus, at a minimum, I would have, first, removed our severe restrictions on translators that would bring FM to nearby communities which receive no radio service at all and, second, invited requests to waive those restrictions for translators bringing an FM signal to neighboring communities not already enjoying a minimal level of radio service. I therefore vote for this item subject to these reservations.

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations

I find myself somewhat torn between two competing policy goals raised by this item.

On the one hand, we need to be concerned about localism: about the viability of full-service stations, especially in small and rural markets; about their continued public service to local communities. Too many imported signals may indeed undermine continued local service by incumbent FM stations.

On the other hand, we need to be concerned also about the public's interest in diverse voices and viewpoints. This action of the Commission, in my judgment, does not adequately grapple with these competing concerns. Instead, it focuses on returning FM translators to their original, "proper" role as a fill-in service.

In addition, while I do not necessarily want to see the development of a full-scale "low power FM service," I think it might have been valuable for the Commission to explore the potential of FM translators as a way for small entrepreneurs, in certain special circumstances, to gain a foothold in the broadcast industry.

I am voting for this item because, on balance, I believe that our overriding public policy concern must be the need to help full-service FM stations, which have explicit public service obligations, serve the needs of the listening public.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-503

In re Applications of

NUGGET BROADCASTING COMPANY (hereafter "Nugget")	File No. BPH-890728MD
GEORGIA MOUNTAINS COMMUNICATIONS, INC. (hereafter "GMC")	File No. BPH-890728ME
KEVIN C. CROOM (hereafter "Croom")	File No. BPH-890728MG
GJ COMMUNICATIONS (hereafter "GJ")	File No. BPH-890731MK

For Construction Permit
for a New FM Station on Channel 282A
in Dahlonega, Georgia

HEARING DESIGNATION ORDER

Adopted: October 11, 1990; Released: December 3, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Croom.* Croom is employed by Habersham Broadcasting Company, licensee of WCON(FM), Cornelia, Georgia as a News Director. Croom's employment in a managerial capacity represents a potential violation of the Commission's cross-interest policy. *See, e.g., Martin Lake Broadcasting Company*, 21 FCC 2d 180, 181-182 (1970). Croom has indicated his intent to terminate his employment with WCON(FM) in the event of grant of his application. Accordingly, in the event of grant of Croom's application, he will be required to sever all connections with WCON(FM) prior to the commencement of program test authority.

3. *Late-filed Amendments.* Croom petitioned for leave to amend its application on February 12, 1990 and June 11, 1990. The accompanying amendments were filed after January 10, 1990, the last day for filing minor amendments as of right. The former amendment was filed pursuant to Section 1.65 of the Commission's Rules, and the latter amendment was accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2). Consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. *GJ.* The Commission requires if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply the name of the person who will be responsible for the administration and implementation of the EEO program. Although GJ has filed such a statement, there is a discrepancy. In the tendered application, Timothy Johnston is listed as the General Manager and the person responsible for the implementation of the EEO program. However, in the January 8, 1989 amendment Willa Nelle Gardner is listed as the General Manager. Accordingly, GJ will be required to file a clarifying amendment in reference to responsibility for the implementation of the EEO program with the Administrative Law Judge, or an appropriate issue will be specified by the Judge.

5. *Other Matters.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Nugget and GMC would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Section II, Item 6 of FCC Form 301 (June 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Nugget and GJ have not completed Item 6 correctly. Nugget's application gives a street name as the residence address for Georgette B. Andrews and Jones P. Andrews. GJ's application gives a street name along with a post office box number as the residence address for Timothy Jay Johnston. Accordingly, Nugget and GJ must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge after this Order is released.

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Nugget and GMC would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That, in the event of grant of Croom's application, Croom will be ordered to divest himself of all interests in and sever all connections with Station WCON(FM), Cornelia, Georgia prior to the commencement of program test authority.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Croom ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, GJ shall submit a clarifying amendment in response to Section VI information with the presiding Administrative Law Judge.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That Nugget and GJ shall submit an amendment which contains the information required by Section II, Item 6 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

First Commonwealth Communications, Inc.
Complainant

v. File No. PA-85-016

Virginia Electric and Power Company,
d/b/a Virginia Power Company
Respondent.

ORDER

Adopted: November 27, 1990; Released: November 28, 1990

By the Chief, Accounting and Audits Division:

1. On November 13, 1990, Virginia Electric and Power Company (VEPCO) filed a motion requesting permission to file a consolidated response in Commission proceedings PA-85-016 and PA-87-006 (Newport News Cablevision, Ltd., Complainant v. Virginia Electric and Power Company, Respondent), or in the alternative, to file a supplemental response in PA-85-016. VEPCO contends that these proceedings are already consolidated, and therefore we should allow a consolidated response in the two proceedings. Moreover, VEPCO contends that because the two proceedings involve identical issues, a consolidated response is appropriate and would avoid repetition.

2. In support of the motion to supplement its response in PA-85-016, VEPCO states that new factual information and data, "some of which has been generated within the last five years," will materially aid the Commission in resolving the issues presented in both proceedings. VEPCO also suggests that "unusual circumstances surrounding the handling of these cases by the Commission" warrant Bureau approval of the request to supplement.[1]

3. Complainants in both proceedings, First Commonwealth Communications and Newport News Cablevision (the Cable Companies) filed an opposition on November 16, 1990 to VEPCO's motion. The Cable Companies state that VEPCO has no right to supplement its response in PA-85-016. The Cable Companies point out that the extensions of time granted in that proceeding are in regard to VEPCO's right to reply to First Commonwealth's Motion to Strike a VEPCO pleading which was filed as a response to another cable company's filing in PA-85-016. Moreover, the Cable Companies maintain that past Bureau rulings support the position that a supplemental response is to be left "to the petition for reconsideration or application for review."[2]

4. The Cable Companies further oppose VEPCO's motion because PA-856-016 and PA-87-006 are distinct, and therefore, nothing "prevents VEPCO from responding to the *Newport News*' Complaint in PA-87-006." The Cable Companies also maintain that VEPCO will not be prejudiced by honoring the "pleading rules", but to allow a supplemental response would divest First Commonwealth of its right to have the complaint decided by the Commission under the "simple and expeditious" procedures directed by Congress. Finally, the Cable Companies claim that First Commonwealth is financially precluded from participating in another pleading cycle, and therefore, the Bureau should not allow a supplemental response.

5. In its reply, filed November 21, 1990, VEPCO states that the Cable Companies' opposition does not address VEPCO's request to file a consolidated response. VEPCO suggests that since there is no objection, and since a consolidated response would simplify the resolution of the issues in both proceedings, its request to file a consolidated response should be granted. VEPCO also claims that the Commission has treated the proceedings as if they were consolidated.

6. In response to the Cable Companies' opposition, VEPCO maintains that the Cable Companies "miss the point" in their position that VEPCO has no right to supplement its response in PA-85-016, because it is within the Commission's discretion to allow a supplemental filing under circumstances warranting such a supplementation. Moreover, VEPCO states the Bureau decisions cited by the Cable Companies to support their position that VEPCO may not file a supplemental response in PA-85-016 are inapposite to the facts of these proceedings. VEPCO also claims that the Cable Companies' position that the proceedings are distinct is undermined by the Cable Companies past conduct and the complaints themselves which present the same basic issues. VEPCO claims that First Commonwealth's financial distress argument "rings rather hollow", and suggests that no reply to a supplemental filing in PA-85-016 is necessary. Finally, VEPCO disagrees with the Cable Companies' statement that VEPCO will not be prejudiced by a decision to disallow a supplemental filing. VEPCO maintains that without a supplemental response in PA-85-016, it will suffer prejudice because the case will be decided on a stale record.

7. Initially, we note that the Bureau has never consolidated the two proceedings. Although the captions of the motions for extensions of time filed by VEPCO have referred to both proceedings, the Bureau has never stated that the proceedings were consolidated. We agree with First Commonwealth's statement that the extensions of time granted by the Commission in PA-85-016 were in regard to the Motion to Strike filed by First Commonwealth, and that these extensions do not support a consolidation. We also agree with First Commonwealth that the two proceedings are factually distinct. Therefore, we will not allow VEPCO to file a consolidated response in the two proceedings.

8. We do, however, find that, because of the extraordinary time lapse since the filing of the response, a supplemental response is warranted.[3] Although we find that a supplemental response is warranted in PA-85-016, we limit this response to information and data in the initial response filed by VEPCO which has changed since VEPCO filed that response in this proceeding. VEPCO may not add new issues or information which does not directly relate to a change in the information or data filed in its original response. Such a limitation should address First Commonwealth's financial concerns since First Commonwealth will, if it so chooses, need only to supplement its reply to the extent changes have occurred over the past five years.[4] In anticipation of its request, we will allow First Commonwealth to supplement its reply in

PA-85-016 to the extent that changes have occurred since filing its reply. First Commonwealth's supplemental reply, if it chooses to file one, is due on **December 24, 1990.**

9. Accordingly, IT IS ORDERED, that Virginia Electric and Power Company's motion for permission to file a consolidated response, or in the alternative, to supplement its response in PA-85-016 is GRANTED to the extent indicated herein, and otherwise is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

FOOTNOTES

[1] VEPCO Motion at 3. The unusual circumstances are the extensions of time that we have granted and the parties' attempts to settle this proceeding.

[2] First Commonwealth's Opposition at 2, *citing* Warner-Amex Cable Communications, Inc., Complainant v. Central Vermont Public Service Corp., Respondent, *Memorandum Opinion and Order*, PA-82-0049, Mimeo. No. 5245 (released July 22, 1982) (*Mimeo No. 5245 Order*); Warner-Amex Cable Communications and Essex 1980-1 Operating Partnership, Complainant v. Potomac Edison Company, Respondent, *Memorandum Opinion and Order*, PA-82-0050, Mimeo No. 5174 (released July 16, 1982) (*Mimeo No. 5174 Order*).

[3] In this regard, we find that the cases cited by First Commonwealth for the proposition that a supplemental response is not allowed are inapplicable to this situation. In the *Mimeo No. 5174 Order*, the Respondent sought to supplement its pleading in response to Complainant's reply. In the *Mimeo No. 5245 Order*, the Respondent sought to supplement its pleading with information it supposedly had supplied in its response. These facts are very different from those presented by this case.

[4] We dismiss First Commonwealth's contention that we have "divested" it of a right to have the Commission decide its complaint under "simple and expeditious" procedures directed by Congress. First Commonwealth's agreement to extensions of time in this proceeding for over two years, since the Commission announced its intention to begin processing pole attachment complaints again, *Public Notice*, 2 FCC Rcd 189 (1988), indicates its willingness to forego the "expeditious" treatment of its complaint.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b), RM-5657
Table of Allotments
FM Broadcast Stations
(Hinesville, Georgia)

MEMORANDUM OPINION AND ORDER

Adopted: November 20, 1990; Released: December 3, 1990

By the Chief, Policy and Rules Division:

1. The Commission has before it for a petition for reconsideration filed by Hinesville Broadcasting Corporation ("HBC"), licensee of Station WXLQ (formerly Station WBLU), Channel 221A, Hinesville, Georgia.[1] This petition is directed against the November 17, 1987, action of the Chief, Allocations Branch, which returned the HBC petition for rule making proposing the substitution of Channel 222C2 for Channel 221A at Hinesville, Georgia, and modification of the Station WXLQ license to specify operation on Channel 222C2.

2. In a separate proceeding in MM Docket No. 87-403, we substituted Channel 222C2 for Channel 221A at Hinesville, and modified the license of Station WXLQ to specify operation on Channel 222C2. *See Report and Order*, 4 FCC Rcd 1029 (1990). As a result of that action, the HBC petition for reconsideration is now moot.

3. Accordingly, IT IS ORDERED, That the aforementioned petition for reconsideration filed by Hinesville Broadcasting Corporation IS HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Public Notice was given on December 8, 1987 (Report No. 1696).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-90-164

Application for authority to acquire and operate facilities for direct service between the U.S. and Jamaica

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 21, 1990; Released: December 5, 1990

By the Chief, International Facilities Division:

1. The above-captioned application filed by MCI Telecommunications Corp. (MCI) requests authority pursuant to Section 214 of the Communications Act of 1934 as amended, to acquire and operate facilities for direct service between the U.S. and Jamaica. The application was placed on public notice on August 22, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Jamaica by MCI.

2. Accordingly, IT IS ORDERED that application File No.I-T-C-90-164 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 96 voice-grade satellite half-circuits between the Andover, Maine earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Jamaica furnished by MCI's correspondent in Jamaica;

b. own and operate 96 voice-grade circuits in the Andover, Maine earth station;

c. acquire and operate 96 voice-grade connecting circuits between the Andover, Maine earth station and MCI's West Orange, New Jersey operating center; and

d. use said facilities to provide MCI's regularly authorized services, including switched voice between the U.S. and Jamaica and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Jamaica. A copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-91-009

Application for authority to lease and operate facilities for direct service between the U.S. and the Philippines.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 27, 1990; Released: December 5, 1990

By the Chief, International Facilities Division:

1. The captioned application, filed by MCI Telecommunications Corporation, requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite facilities for direct service between the U.S. and the Philippines. The application was placed on public notice on October, 18, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and the Philippines by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-009 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 200 voice-grade satellite half-circuits between the Yacolt, Washington earth station and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in the Philippines, furnished by MCI's correspondent in the Philippines;

b. own and operate two hundred (200) voice-grade circuits in the Yacolt earth station to be used in conjunction with the satellite space segment;

c. own and operate two hundred (200) voice-grade connecting circuits between the Yacolt earth station and MCI's Dominguez Hills, California, operating center; and

d. use said facilities to provide MCI's regularly authorized services, including switched voice service, between the U.S. and the Philippines and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in the Philippines, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

ALASCOM, INC. File No. I-T-C-90-106

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish and operate channels of communication for the provision of international private line service between Anadyr, Magadan, Union of Soviet Socialist Republics and Eagle River, Alaska, using transponder capacity in the AURORA satellite system

ALASCOM, INC. File No. CSG-90-054-ML

For authority to modify its license for a domestic earth station at Eagle River, Alaska (KD5O) to provide service between Alaska and the Union of Soviet Socialist Republics via the AURORA satellite system

ORDER AND AUTHORIZATION

Adopted: November 27, 1990; Released: December 5, 1990

By the Chief, Common Carrier Bureau:

1. The Commission has under consideration applications filed by Alascom, Inc. (Alascom) requesting authority pursuant to Section 214 and Title III of the Communications Act of 1934, as amended, to establish and operate channels of communications between Alascom's domestic satellite transmit/receive earth station serving Eagle River, Alaska (Call Sign KD5O) and Anadyr, Magadan, Union of Soviet Socialist Republics (U.S.S.R.) using existing capacity in Alascom's Aurora I (Satcom V) satellite and connecting facilities. The applications were placed on the Commission's public notice on May 16, 1990, and no comments were received.

2. Alascom proposes to establish three 32 Kbps satellite channels for private line voice and data service between Anadyr, U.S.S.R. and Eagle River, Alaska. The channels will be used by the Federal Aviation Administration (FAA) to coordinate regional air traffic control between U.S. and the U.S.S.R. In its November 19, 1990 letter, Alascom states that it will provide the service to the U.S.S.R. utilizing a 15.0-meter C-band antenna (antenna No. 2 of its license for three C-band antennas under Call Sign KD50) at its Eagle River earth station. In the event that antenna No. 2 is out of service, then it will use either antenna No. 1 (15.0-meter) or No. 3 (12.0-meter) as a backup. In conjunction with Soviet authorities, Alascom states it will cooperate in establishing a new earth station in Anadyr, U.S.S.R. to communicate with Eagle River. Alascom indicates that the Anadyr earth station will be located at 64-34-48 North Latitude and 182-19-48 West Longitude. Alascom states that currently there is no direct satellite interconnection between Alaska and the U.S.S.R.

3. The satellite channels proposed will supplement existing direct international service to the U.S.S.R. provided by Alascom. Pursuant to previously authorized and existing international services, Alascom offers, through interconnection, public switched services, including international message telecommunications service between Alaska and portions of the Soviet Far East, including Anadyr. However, Alascom states that, given the present nature of the Soviet network in Magadan and FAA quality and reliability requirements, direct satellite interconnection between Anadyr and Eagle River is necessary.

4. Alascom states that the proposed private line service would allow communications between the FAA and its counterpart in the U.S.S.R. It would allow improved international air traffic control which would benefit public health, safety, and welfare. In order to provide satellite interconnection between Anadyr and Eagle River, Alascom will modify or supplement the electronics at its Eagle River earth station complex. Alascom states that there will be no changes to the operation particulars contained in its radio station license for its Eagle River earth station, Call Sign KD50, File No. 430-DSE-ML-86.

5. By letter dated July 19, 1990, Alascom informed the Commission that it was currently negotiating with representatives from the U.S.S.R. to determine the equipment necessary to establish the earth station at Anadyr, Magadan, U.S.S.R., and to what extent Alascom will supply some or all of the equipment. Alascom states that it will obtain all necessary export authorizations for any equipment it provides for use in establishing the Anadyr earth station. By letter dated November 9, 1990, the U.S. Department of State informed the Commission that U.S. obligations under Article XIV(d) of the INTELSAT Agreement have been satisfied with respect to the use of the AURORA I (Satcom V) satellite for service between Alaska and the U.S.S.R. through 1999.

6. In view of these circumstances, we find that grant of the instant applications for Alascom to use its earth station, Call Sign KD50, at Eagle River, Alaska to establish private international channels of communications between Alaska and the U.S.S.R. via the AURORA I (Satcom V) satellite will serve the public interest.

7. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-90-106 and CSG-90-054-ML ARE GRANTED, and:

a) Alascom, Inc. is authorized to establish three 32 Kbps satellite channels of communication between its satellite earth station, Call Sign KD50, at Eagle River, Alaska and Anadyr, Magadan, U.S.S.R., via the AURORA I (Satcom V) satellite for the provision of private line voice and data services; and

b) The radio station license for Alascom, Inc.'s domestic satellite earth station at Eagle River is hereby modified to permit communications between Alaska and the U.S.S.R. via the AURORA I (Satcom V) satellite, primarily utilizing its 15.0-meter C-band

antenna (No. 2 on its license, Call Sign KD50) or utilizing either its 15.0-meter (antenna No. 1) or its 12.0-meter (antenna No. 3) earth station as a backup in the event of a failure of antenna No. 2.

8. IT IS FURTHER ORDERED that this authorization is subject to Alascom's satisfaction of any requirements imposed by the Coordinating Committee for Multilateral Export Control (COCOM) and coordination with the Department of Commerce for any equipment supplied to the U.S.S.R.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 81-893

In the Matter of

Procedures for Implementing
The Detariffing of Customer
Premises Equipment and Enhanced
Services (Second Computer
Inquiry)

TENTATIVE DECISION ON REMAND

Adopted: November 20, 1990; Released: December 5, 1990

By the Commission:

I. INTRODUCTION

1. In *ATTIS v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit held that the Commission had failed to provide reasoned support for its decision in this proceeding to require the American Telephone and Telegraph Company ("AT&T") to pay the Bell Operating Companies ("BOCs") net book value plus refurbishment costs for the "refurbished inventory CPE" the BOCs transferred to AT&T Information Systems, Inc. ("ATTIS") at divestiture.[2] The Court remanded the case to the Commission for reexamination of the transfer price for refurbished inventory CPE, [3] in accordance with principles set out in the Court's decision in *Democratic Central Committee*.[4] In this Order, we tentatively conclude that, in view of the risks and opportunities the transfer created for AT&T, the transfer price for refurbished inventory CPE should be net book value. We invite comment on this tentative conclusion.

II. BACKGROUND

A. Prior Commission Proceedings

2. The question whether the transfer price for refurbished inventory CPE should include refurbishment costs arose when the Commission established procedures for deregulating "embedded CPE"[5] in a manner consistent with *Computer II* principles and the Modified Final Judgment (MFJ). Those procedures required the BOCS to transfer virtually all embedded CPE to ATTIS as of January 1, 1984, the date of the divestiture of the Bell System. The Commission concluded that the CPE should be transferred at its "economic value," which the Commission defined as "the price a carrier would be willing to pay for its CPE if, instead of owning it, the carrier had the opportunity to purchase it."[6]

3. The Commission recognized the difficulty of measuring the economic value of the millions of pieces of CPE that were to be transferred.[7] The Commission determined that it would be appropriate to use net book value as a surrogate for economic value, provided AT&T received a fair opportunity to recover the amount it would pay for embedded CPE and ratepayers received a fair opportunity to capture any increase there may have been in the value of that equipment.[8]

4. The Commission's plan distinguished between CPE that was in use by Bell System customers (i.e., in-place CPE) and inventory CPE. The Commission required AT&T to offer all embedded in-place CPE to then-current customers at prices not exceeding the overall net book value of the equipment, plus transaction costs. The Commission believed that this sales program would give AT&T an opportunity to recover the amount it would pay for in-place CPE, while allowing ratepayers to capture any increase there may have been in the value of that CPE.[9]

5. Inventory CPE was not subject to a mandatory sales program, even though approximately sixty percent of this CPE had been refurbished after being removed from the customers' premises.[10] The Commission determined that refurbishment had increased the economic value of inventory CPE and that ratepayers had borne the costs of this refurbishment. The Commission also determined that, since AT&T would be allowed to sell this refurbished CPE at market prices, investors, not ratepayers, would receive any increase in the value of this CPE if it were transferred at net book value. To ensure that ratepayers would have an opportunity to receive the increase in value resulting from refurbishment, the Commission required AT&T to pay the BOCs net book value plus refurbishment costs for refurbished inventory CPE.[11] On reconsideration, the Commission affirmed this requirement despite AT&T's argument that refurbishment had not raised the economic value of inventory CPE above its net book value.[12]

B. The D.C. Circuit's Decision

6. In *ATTIS v. FCC*, the D.C. Circuit held that the Commission had failed to provide reasoned support for including refurbishment expenses in the transfer price for refurbished inventory CPE. The Court agreed that net book value constituted an acceptable surrogate for the aggregate economic value of all the embedded CPE transferred from the BOCs to ATTIS. The Court determined, however, that the Commission had assumed that refurbished inventory CPE would have an economic value at least equal to its net book value and that "[o]n any resale of refurbishment inventory, . . . [ATTIS] would be able to recapture the net book value of the CPE, which included the reimbursed refurbishment costs."[13] The Court concluded that these assumptions were inconsistent with the Commission's use of net book value as a surrogate for the economic value of all other categories of CPE, and failed to recognize that technological changes, obsolescence, and other factors might keep AT&T from selling refurbished CPE at net book value.[14] In the Court's view, the Commission had placed AT&T in the position of having "to reimburse ratepayers for refurbishment costs whose addition to real value [was] speculative, . . . [while exposing AT&T] to a risk of loss it [could] no longer transfer to ratepayers in the form of depreciation charges."[15]

7. The Court stated that deregulation had exposed AT&T to a risk of loss on refurbished inventory CPE. The Court indicated that the Commission may have overlooked this risk because of the manner in which it applied *Democratic Central Committee*.[16] That case

articulated two principles for allocating between ratepayers and investors increases in the value of utility assets while in operating status. The first, or "risk-of-loss," principle, states "that the right to capital gains on utility assets is tied to the risk of capital losses."[17] The second, or "benefits-burdens" principle, provides "that those who bear the financial burden of particular utility activity should also reap the benefit resulting therefrom."[18]

8. The Court stated that these principles must be applied sequentially. According to the Court, the Commission must first determine under the risk-of-loss principle whether ratepayers, rather than investors, should receive the refurbishment costs associated with inventory CPE. Only if that principle proves to be inapplicable may the second, burdens-benefits principle, be invoked. The Court stated that the Commission had failed to observe the distinction between these principles and the order in which they must be applied in determining the price AT&T would pay for refurbished inventory CPE.[19]

III. DISCUSSION

9. Applying *ATTIS v. FCC*, we conclude that ratepayers are entitled to any increase there may have been in the value of refurbished inventory CPE prior to its transfer to ATTIS, and we therefore reaffirm that the transfer price for this CPE should equal its economic value. We tentatively conclude, however, that net book value, not net book value plus refurbishment costs, is the most acceptable and reasonable surrogate for the economic value of refurbished inventory CPE.

10. As an initial matter, we note that no party has seriously contended that ratepayers did not bear the risk of capital losses on all categories of embedded CPE prior to its transfer to ATTIS. The Notice of Proposed Rule Making tentatively concluded that ratepayers had borne that risk and that *Democratic Central Committee*, therefore, required that any gains or losses resulting from the transfer to ATTIS should flow to ratepayers.[20] The *Report and Order* implicitly confirmed those tentative conclusions in determining that the CPE should be transferred at its economic value.[21] Indeed, in its appellate brief, AT&T agreed that a transfer at economic value would satisfy the requirements of *Democratic Central Committee* "because ratepayers would receive the benefit of any gain if market value exceeded net book value, and would bear the burden of any loss if market value were less than net book value."[22] Having concluded that ratepayers bore the risk of loss, we need not apply the second principle of *Democratic Central Committee*, and we reaffirm that the transfer price for refurbished inventory CPE should equal its economic value.

11. The difficulty now encountered is measuring that economic value. In its prior orders in this proceeding, the Commission considered a number of alternative methods for measuring the economic value of embedded CPE. Those methods included auctioning the CPE, obtaining appraisals of all or a representative sample of the CPE, calculating the current value of the net revenues the CPE could be expected to generate, conducting evidentiary hearings, and referring the matter to state commissions.[23] The Commission determined that the alternatives were unworkable and that it was not practical to attempt to determine the economic value of the embedded CPE that was to be transferred to AT&T.[24]

12. We continue to believe that there is no workable method for exactly determining the economic value of embedded CPE. Any effort in this regard would assess the value of the CPE as of January 1, 1984, the date it was transferred to AT&T, on the basis of reliable information regarding the opportunities and risks AT&T faced at that time. Quantifying those opportunities and risks would require, among other endeavors, examining the state of the CPE markets as of January 1, 1984, the barriers to entering those markets at that time, the changes deregulation promised to have on those markets, and the effect those changes would have on AT&T's ability to sell refurbished inventory CPE. We believe that any information we might obtain on these matters would be speculative, at best, and would not enable us to measure, with any degree of certainty, the economic value of refurbished inventory CPE as of January 1, 1984.

13. Previously in this proceeding the Commission determined that any attempt to measure the economic value of embedded CPE would impose significant costs that ratepayers might have to bear.[25] While the measurement process might be somewhat less costly if it were restricted to refurbished inventory CPE, the costs of that process would be magnified by virtue of the passage of more than six years from the critical date. This is because reliable data from the pre-divestiture period is essential for an analysis of the opportunities and risks AT&T faced as of January 1, 1984. Such data is no longer readily available or susceptible to verification. We believe that we should not attempt to assemble or reconstruct this data since even a successful attempt would not enable us to measure the economic value of refurbished inventory CPE with any degree of certainty. Accordingly, we tentatively conclude, as was the case with all other embedded CPE, that we should not attempt to measure the economic value of refurbished inventory CPE.

14. In its prior orders, the Commission found it appropriate to use a surrogate for economic value that bore no necessary relationship to the CPE's economic value.[26] If, as we tentatively conclude, it is not feasible to measure the economic value of refurbished inventory CPE with any degree of certainty, we believe that we must select a reasonable surrogate for that economic value. We now recognize that, while refurbishment increased the economic value of inventory CPE so that the value may be above net book, other factors may have decreased that value to net book or, possibly, below net book value.[27] For example, much of the refurbished inventory CPE that was transferred to ATTIS had been designed years prior to the transfer. The introduction of new and innovative equipment into the CPE marketplace may have reduced customer demand for this CPE and thereby made it impossible for AT&T to sell it for its net book value. In these circumstances, we believe that it would be inappropriate to depart from the Commission's prior conclusion that net book value constitutes an acceptable and reasonable surrogate for the economic value of all categories of CPE transferred from the BOCs to ATTIS. Therefore, we tentatively conclude that the transfer price for refurbished inventory CPE should equal its net book value. We request comment on this tentative conclusion and the other matters discussed in this order.

IV. PAPERWORK REDUCTION ACT

15. This proposal has been analyzed with respect to the Paperwork Reduction Act of 1980[28] and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

V. REGULATORY FLEXIBILITY ACT

16. We certify that the Regulatory Flexibility Act[29] is not applicable to the proposal we are making in this proceeding. In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of a summary of this tentative decision in the Federal Register. As part of our analysis of the tentative conclusions described in this order, however, we have considered the impact of the proposals on small telephone companies, *i.e.*, those serving 50,000 or fewer access lines.[30] The actions proposed herein, if eventually adopted in a final order, are expected to have a minimal impact on small carriers because the transfer of the CPE under consideration was between telephone companies with annual operating revenues in excess of $100 million.

VI. EX PARTE CONTACTS

17. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period.[31] The Sunshine Agenda period is the period of time which commences with release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (a) releases the text of a decision or order in this matter; (b) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (c) issues a public notice stating that the matter has been returned to staff for further consideration, whichever occurs first.[32] During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding.[33]

18. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (a) if written, is not served on the parties to the proceeding, or (b) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present.[34] Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is made or submitted two copies of same to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

19. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to each Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or or captioned as an *ex parte* presentation.[35]

VII. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, That pursuant to Sections 1, 4(i), 4(j), 201-205, 213, 218, 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 154(j), 201-05, 213, 218, 220, and 403, and Section 553 of the Administrative Procedure Act, 5 U.S.C. §553, notice is hereby given of the proposals set forth in this Tentative Decision. We hereby give notice that in reaching our decision in this proceeding we will not necessarily be limited to the comments and reply comments that may be filed, and that we may utilize other information, analyses, and reports, provided that in each such case a copy of the material relied upon will be associated with the record of this proceeding.

21. IT IS FURTHER ORDERED, That interested persons may file comments on the specific proposals discussed in this Tentative Decision on or before January 18, 1991. Reply comments shall be filed on or before February 4, 1991. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. §1.419, an original and five (5) copies of all comments shall be furnished to the Commission. Copies of the comments will be available for public inspection in the Commission's Docket Reference Room, 1919 M Street, N.W., Washington, D.C.

22. IT IS FURTHER ORDERED, That the Secretary shall serve a copy of this Tentative Decision on state regulatory commissions.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] AT&T Information Systems, Inc. v. FCC, 854 F.2d 1442 (D.C. Cir. 1988)(*ATTIS v. FCC*).

[2] Refurbished inventory CPE is customer premises equipment (CPE) that had been removed from service and refurbished, but not returned to service, prior to being transferred to ATTIS.

[3] *ATTIS v. FCC*, 854 F.2d at 1446-47.

[4] Democratic Central Committee v. Washington Metropolitan Area Transit Comm'n, 485 F.2d 786 (D.C. Cir. 1973) (*Democratic Central Committee*), *cert. denied*, 415 U.S. 935 (1974).

[5] CPE in existence prior to 1983 and in use by Bell System customers or in Bell System inventories as of January 1, 1983, is called "embedded CPE." CPE obtained after January 1, 1983, is called "new CPE." *See* Amendment of Section 64.702 of the

Commission's Rules and Regulations (Second Computer Inquiry), *Memorandum Opinion and Order on Further Reconsideration*, 88 FCC 2d 512, 527-8 (1981).

[6] Procedures for Implementing The Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), CC Docket No. 81-893, 95 FCC 2d 1276, 1306 (1983)(*Report and Order*), *recon.*, FCC 85-35 (released Jan. 29, 1985) (*Reconsideration Order*), *remanded*, *ATTIS v. FCC*, *supra*.

[7] *See* Procedures for Implementing The Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), Notice of Inquiry, 89 FCC 2d 694, 697-99 (1982)(*Notice of Inquiry*).

[8] *Report and Order*, 95 FCC 2d at 1308; *id.* at 1319. The Commission defined net book value as original cost less related depreciation reserves. *Id.* at 1306, n.40.

[9] *Id.* at 1319.

[10] *See Reconsideration Order*, slip op. at 42.

[11] *Id.* at 1388. The Commission also required that the BOCs flow the interstate portion of the proceeds from the transfer through to interstate ratepayers. The states, of course, were free to fashion their own ratemaking practices. *See id.* at 1368-70, 1388; *see also* American Telephone and Telegraph Co., Request for Approval to Supplement the Capitalization of American Bell, Inc., 95 FCC 2d 578, 602 (1982).

[12] *See Reconsideration Order*, slip op. at 44-45.

[13] *ATTIS v. FCC, 854 F.2d at 1447. Technically, net book value does not include costs, such as refurbishment costs, that were expensed during the year in which they were incurred.*

[14] *Id.* at 1446-47.

[15] *Id.* at 1447.

[16] *Id.*

[17] *Democratic Central Committee*, 485 F.2d at 806.

[18] *Id.* at 808.

[19] *ATTIS v. FCC*, 854 F.2d at 1443, 1446-47.

[20] *See* Procedures for Implementing The Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), Notice of Proposed Rule Making, 94 FCC 2d 76, 90-91 (1983) (*Notice of Proposed Rulemaking*).

[21] *Report and Order*, 95 FCC 2d at 1306, 1319.

[22] ATTIS Initial Brief at 35, *ATTIS v. FCC*, *supra*. We note that AT&T uses "economic value" and "market value" interchangeably. *Id.* at 7, n.7.

[23] *Report and Order*, 95 FCC 2d at 1307-10; *Notice of Proposed Rulemaking*, 94 FCC 2d at 91; *Notice of Inquiry*, 89 FCC 2d at 698-99.

[24] *Report and Order*, 95 FCC 2d at 1319. *Notice of Proposed Rulemaking*, 94 FCC 2d at 91.

[25] *See Report and Order*, 95 FCC 2d at 1306-08.

[26] *Id.* at 1309-10.

[27] *See ATTIS v. FCC*, 854 F.2d at 1447.

[28] 44 U.S.C. §3501-20.

[29] 5 U.S.C. §601 *et seq.*

[30] Because of the nature of local exchange and access service, the Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, the Commission is not required by the terms of that Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies wherever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

[31] *See generally* 47 C.F.R. §1.1206(a).

[32] 47 C.F.R. §1.1202(f).

[33] 47 C.F.R. §1.1203.

[34] 47 C.F.R. §1.1202(b).

[35] 47 C.F.R. §1.1206.

te Regulatory
of proposed

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-21

In re Applications of

FRESNO FM LIMITED PARTNERSHIP	File No. BPH-861230MB
John Marshall Hooker d/b/a JMH BROADCASTING	File No. BPH-861230ME
JOHN EDWARD OSTLUND	File No. BPH-861231MD
VALLEY RADIO LTD. A California Limited Partnership	File No. BPH-861231ME
LAURA H. NORMAN	File No. BPH-861231MI

For Construction Permit for
New FM Station, Channel 257A,
Fresno, California

MEMORANDUM OPINION AND ORDER

Adopted: November 20, 1990; Released: December 5, 1990

By the Commission:

1. In an *Initial Decision*, 4 FCC Rcd 7973 (1989), Administrative Law Judge Joseph Chachkin (ALJ) found that Fresno FM Limited Partnership (Fresno) was the comparatively superior applicant in this proceeding and granted its application. Carta Corporation (Carta) was ranked second by the ALJ.

2. The Review Board, however, found problems with those two applicants. *Memorandum Opinion and Order*, 5 FCC Rcd 3696 (1990). The Board concluded that Fresno's limited partnership arrangement and its integration proposal were not *bona fide*, and that Fresno was therefore not entitled to any integration credit. *Id.* at 3696-3702 ¶¶ 4-18. As to Carta, the Board noted that it had petitioned to amend its application to report the death of John Sonder, its sole stockholder and the proposed full-time general manager of its station, and to substitute his widow, Dr. Sylvia Sonder, as his successor, thus seeking to maintain the 100 percent full-time ownership integration credit it had been awarded. However, because Mr. Sonder's earlier testimony indicated that his wife, who has her own full-time psychology practice, would not be involved in running the station, the Board concluded that Dr. Sonder's claim of full-time integration could not be accepted at face value without being tested in evidentiary hearing. Accordingly, it remanded the proceeding to the ALJ to determine the amount of credit Carta should be awarded based on its amended proposal.[1] *Id.* at 3702-3703 ¶¶ 19-23.

3. Now before us are a Motion for Leave to File Application for Review and an Application for Review, both filed July 19, 1990, by Fresno, and Oppositions to the motion filed July 25 and 30, 1990, by John Edward Ostlund and Laura H. Norman, respectively. In its motion, Fresno contends that the Board's holding, which rejected its integration proposal on the basis that its limited partnership was not *bona fide*, has effectively eliminated it from competition in this proceeding and thus constitutes, for all practical purposes, a denial of its application. Fresno further submits that the Board's holdings with respect to it have both precipitated the filing of petitions to enlarge issues in two other ongoing hearing proceedings involving some of its principals, and created uncertainty regarding the standards to be utilized by the Commission in evaluating limited partnerships. Accordingly, Fresno urges us to review that portion of the Board's *Memorandum Opinion and Order*, *supra*, holding that its limited partnership is not *bona fide*. We will deny the request.

4. The Board's *Memorandum Opinion and Order* remanding this case for further proceedings is an interlocutory action; it neither terminated Fresno's right to participate in this proceeding nor did it deny Fresno's application. 47 C.F.R. § 1.115(e)(1) specifically provides that applications for review of interlocutory rulings by the Board are to be filed only as a part of the application for review of the Board's final decision in the proceeding. Fresno's request for partial review would circumvent the provisions of § 1.115(e)(1) and undermine the orderly conduct of this case.

5. A party asking to proceed in a manner other than prescribed by our procedural rules, including § 1.115(e)(1), has a heavy burden of establishing that the resulting disruption of the proceeding is outweighed by compelling and urgent circumstances which could not be considered by their timely presentation in accordance with those rules. *See George E. Cameron, Jr. Communications*, 51 RR 2d 1419, 1420 (1982), and *Rocket Radio, Inc.*, 58 FCC 2d 663, 664 (1976). Fresno has not made such a showing. To the extent that it contends the Board erred legally by relying solely on the activities of Fresno's limited partners in the formation of the partnership as a basis for holding that they, rather than the designated general partner, exercised exclusive control over the partnership, such a contention provides no basis for granting the extraordinary relief requested. Fresno will have ample opportunity to be heard in that respect based on a timely filed application for review of the Board's final decision in this case.

6. Nor are we persuaded that the filing of petitions to enlarge issues against some of Fresno's principals in other ongoing proceedings presents compelling and urgent circumstances justifying the disruption of the orderly conduct of this case. In those proceedings, Fresno likewise may contend -- via the filing of appropriate oppositions -- that the petitions should not be granted based on the Board's holdings in the interlocutory order of which it here complains. We have no reason to believe, nor has Fresno made any showing, that the Administrative Law

Judges presiding over those proceedings will not give due and appropriate consideration to any arguments put forth by Fresno in that respect, prior to determining whether or not the issues should be enlarged as requested.[2]

7. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to File Application for Review filed July 19, 1990, by Fresno FM Limited Partnership IS DENIED, and the accompanying Application for Review IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] By FCC 90M-2487, released August 13, 1990, the ALJ dismissed Carta's application and terminated the remanded proceeding, after being informed by Dr. Sonder that she did not intend to further prosecute the application. Hence, the proceeding is now before the Board for the issuance of its final decision in the case.

[2] Fresno's reliance on *RKO General Inc. (KFRC)*, 5 FCC Rcd 3222 (1990), is unavailing. There, the Commission, agreeing with the Board, did render a final disposition as to one of the applicants in the long running RKO proceedings, but that disposition was made pursuant to an application for review of a final Board decision and not on interlocutory Board action such as here.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELAMARKETING
CORPORATION
OF LOUISIANA
Transferor,

and File No. I-T-C-90-114-TC

LDDS
Communications,
Inc.
Transferee,

Application for Authority to Transfer
Control of International Resale
Authorization of Telamarketing
Corporation of Louisiana

MEMORANDUM, OPINION, AND ORDER

Adopted: November 27, 1990; Released: December 4, 1990

By the Chief, International Facilities Division:

1. On May 18, 1990, Telamarketing Corporation of Louisiana (TMC) and LDDS Communications, Inc. (LDDS) filed an application requesting authority to transfer the Section 214 international resale authorization of TMC to LDDS in connection with the acquisition of TMC by LDDS. No comments were received.

2. The parties state that TMC is a Louisiana corporation that provides international message telecommunications services (IMTS) to international locations by reselling the switched voice services of AT&T, MCI and US Sprint.[1] TMC operates under the streamlined regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*.[2] TMC also operates as a non-dominant domestic carrier in accordance with the Commission's regulatory forbearance policies adopted in *Competitive Carrier*. [3] The parties further state that TMC is authorized to provide intrastate long distance service in various states pursuant to certification, registration, tariff requirements or on an unregulated basis.

3. LDDS is a publicly held Tennessee corporation engaged in a variety of businesses including the provision of IMTS and domestic interexchange service. LDDS provides IMTS subject to the streamlined requirements established in *International Competitive Carrier Policies* [4] and domestic interstate service subject to regulatory forbearance under the Commission's *Competitive Carrier* decision. LDDS has subsidiary companies that provide intrastate interexchange service in various states pursuant to certification, registration, tariff requirements or an an unregulated basis.

4. LDDS states that it is not directly or indirectly controlled by aliens or a foreign telecommunications entity; nor is any principal shareholder of LDDS an alien. LDDS also says that none of its directors are aliens or employees, agents or representatives of foreign telecommunications entities. The parties therefore maintain that after the proposed transfer of control of TMC to LDDS, TMC will continue to be subject to streamlined regulatory requirements for non-dominant international telecommunications carriers.

5. TMC and LDDS state they have entered into a stock purchase agreement under which LDDS will acquire control of TMC by purchasing all of its outstanding shares at an aggregate purchase price of $15,500,000. According to the parties, TMC will be a wholly-owned subsidiary of LDDS upon completion of the stock purchase. TMC will provide IMTS to its customers under the same rates, terms and conditions set forth in TMC's current tariff. Accordingly, the parties state that the transaction will be virtually transparent to TMC's customers and thus should not cause any confusion or inconvenience. TMC will be lead by a management team of existing TMC personnel with added LDDS personnel and support.

6. The applicants state that the proposed transaction will allow them to serve their customers better and compete more effectively. They expect to realize economies of scale and significant economic, marketing, and operational efficiencies which will result in superior service, reduced rates and increased profitability. Specifically, TMC will receive financial resources critical to maintaining its financial viability.[5]

7. In addition to the above considerations, we must also address the issue of whether this transaction will inhibit competition and thereby be detrimental to the public interest. Section 7 of the Clayton Act proscribes the acquisition of stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[6] Under Section 11 of that statute, the Commission is empowered to enforce Section 7 in the case of "common carriers engaged in wire or radio communications or radio transmissions of energy."[7] The courts have construed this to mean the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act of 1934, as amended, "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[8] In brief, we are required to consider anti-competitive consequences as one factor in our public interest consideration. In the present instance, both TMC and LDDS are non-dominant carriers and this proposed transaction does not appear to adversely impact the marketplace.

8. In view of the foregoing, we conclude that LDDS's acquisition of the Section 214 authorization held by TMC to provide international switched voice resale services will serve the public interest. It will permit TMC to compete more effectively in the international switched voice service marketplace and increase the quality of service for both TMC customers and LDDS customers.

9. Accordingly, IT IS ORDERED that the application of Telamarketing Corporation of Louisiana and LDDS Communications, Inc., File No. I-T-C-90-114-TC, IS

GRANTED and LDDS is authorized to acquire the Section 214 authorization in File No. I-T-C-89-082 from TMC.

10. IT IS FURTHER ORDERED that the applicants must maintain tariffs pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

11. IT IS FURTHER ORDERED that applicants must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61 (October 1, 1988).

12. IT IS FURTHER ORDERED that LDDS is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in AT&T Communications Tariff F.C.C. No. 1, MCI Tariff F.C.C. No. 1, and US Sprint Tariff F.C.C. No. 1 between the U.S. and those points listed in the aforementioned tariffs in accordance with TMC's previous authorization in File No. I-T-C-89-082.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] *See* TA Investment Company, Inc., 4 FCC Rcd 4498 (1989).

[2] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies).*

[3] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services and Facilities Authorizations Therefor, (First Report and Order), 85 FCC 2d 1 (1980); Second Report and Order, 91 FCC 2d 59 (1982); *recon.*, 93 FCC 2d 54 (1983) (hereinafter *Competitive Carrier).*

[4] *See* Advantage Companies, Inc., 5 FCC Rcd 8413 (1990).

[5] Special Temporary Authority has been granted to TMC to transfer its Section 214 authorization to LDDS for the provision of international switched voice services without prejudice to the ultimate decision in this proceeding. Any cost or obligation made with respect to that temporary authorization was at LDDS's own risk. *See* Letter from Chief, International Facilities Division, to Andrew D. Lipman, TAO-1635, May 30, 1990.

[6] 15 U.S.C. § 18.

[7] 15 U.S.C. § 21.

[8] United States v. FCC, 652 F.2d 77, 88 (D.C. Cir. 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELE-FIBERNET CORPORATION — File No. I-T-C-90-143

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION CERTIFICATE

Adopted: November 28, 1990; Released: December 4, 1990

By the Chief, International Facilities Division:

1. We have before us for consideration an application filed by Tele-Fibernet Corporation (TFN) on June 25, 1990, and supplemented by letter dated July 19, 1990, requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing carriers to provide international switched voice service between the U.S. and various overseas points. TFN is already authorized to provide international switched voice service on a resale basis between the U.S. and specified overseas points listed in the tariffs of the carriers whose services it is authorized to resell.[1] In this application, TFN seeks authority to provide service to all of the points listed in the tariffs of the carriers whose services it is authorized to resell. The application was placed on public notice on July 11, 1990. No comments were received.

2. As noted in TFN's previous authorization to provide international switched voice service on a resale basis, the Commission has recognized that increased competition in international markets is beneficial.[2] We find in this instance that the additional markets TFN proposes to serve will support additional competition and that such additional competition will serve the public interest. [3]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the additional overseas points identified by TFN.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-90-143 IS GRANTED, and TFN is authorized to provide international switched voice service by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI Telecommunications Corp.'s Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2, between the United States, Hawaii, Puerto Rico and the U.S. Virgin Islands, on the one hand and those points listed in those tariffs, including Canada and Mexico, on the other hand.

5. Copies of any operating agreements entered into between the TFN and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that TFN shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989)

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See Tele-Fibernet Corporation*, 2 FCC Rcd 7397 (1987).

[2] *See* the cases cited in *Teltec Saving Communications Co.*, Mimeo No. 3548, note 2, (released April 4, 1986).

[3] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-526

In the Matter of

Amendment of Section 73.202(b),	RM-6974
Table of Allotments,	RM-7014
FM Broadcast Stations.	
(Golconda and Murphysboro, Illinois	
and Lutesville, Missouri)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: November 21, 1990; Released: December 5, 1990

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration[1] filed by Lutesville Broadcasting, Inc. ("Lutesville") of the *Report and Order*, 5 FCC Rcd 3776 (1990), allotting Channel 286B1 to Murphysboro, Illinois, and substituted Channel 232A for Channel 286A at Golconda, Illinois, and Channel 281A for Channel 286A at Lutesville, Missouri.

2. Lutesville petitioned the Commission to reconsider the allotment of Channel 281A at Lutesville, Missouri, and retain the allotment of Channel 286A at Lutesville. Lutesville subsequently filed a request to withdraw and dismiss its Petition for Reconsideration. We will grant Lutesville's request.

3. Accordingly, IT IS ORDERED, That the Petition of Lutesville Broadcasting, Inc., IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Public Notice was given August 8, 1990, Report No. 1824.

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen Docket No. 88-328

In the matter of

Revision of Application for
Construction Permit for Commercial
Broadcast Station (FCC Form 301)

MEMORANDUM OPINION AND ORDER

Adopted: November 20, 1990; Released: December 5, 1990

By the Commission:

1. The Commission has before it a petition for reconsideration filed jointly by Sound Broadcasting Co. ("Sound") and Field Broadcasting Co. ("Field"). Petitioners request that the Commission modify its *Report and Order* in this proceeding, 4 FCC Rcd 3853 (1989), to impose the new Form 301 filing requirements on all persons with Form 301 applications pending at the time of the rule's effective date. For the reasons stated below, the Commission denies the petition for reconsideration.

BACKGROUND

2. The *Report and Order* amended Form 301,[1] the application form for construction permits for commercial broadcast facilities, to require the submission of additional financial, ownership and integration information. After approval by the Office of Management and Budget, the new reporting requirements became effective on June 26, 1989.[2] The *Report and Order* provided that "[a]pplications already on file as of the effective date . . . will not be required to be amended to include the additional information." 4 FCC Rcd at 3861.

3. Petitioners assert that the new filing requirements should be imposed on applications filed before June 26, 1989, for a number of reasons. Petitioners assert that the objectives of the Form 301 amendments -- to eliminate or discourage the filing of sham or abusive applications, and to provide mutually exclusive applicants more information to facilitate early settlements of competing applications -- apply with equal force to applications on file prior to the effective date. They argue that "the evils that led the Commission to amend Form 301 for future applications exist to at least the same extent for past filed applications." Petitioners also assert that retroactive imposition of the new filing requirements will benefit the public by speeding the licensing process, revealing unqualified applicants and eliminating the existing backlog of applications. Petitioners note, however, that their request applies only to those applications not designated for hearing. Petitioners recognize that applications designated for hearing "present different problems and may warrant exemption from the new requirements." No party opposed the petition.

DISCUSSION

4. After careful consideration of the petition, we continue to believe that the Commission properly weighed and balanced all relevant factors, and correctly concluded that the new filing requirements should be imposed only on applicants who filed after June 26, 1989. In deciding to apply the modified filing requirements to new applicants only, the Commission carefully considered numerous factors. On the one hand, the Commission recognized the public interest benefits, enumerated by petitioners, of implementing the new filing requirements as quickly and as broadly as possible. At the same time, however, the Commission recognized that there would be significant administrative burdens imposed by requiring existing applicants to amend their filings, and that these burdens could significantly delay application processing. The Commission concluded that the balance should be struck by imposing the new filing requirements to new applicants only.

5. The Commission's concern with application backlogs was particularly acute at the time of the *Report and Order*, because of the very large backlog of applications filed for FM allotments created as a result of MM Docket No. 80-90. [3] Our experience since the *Report and Order* confirms that it was entirely reasonable to decline to impose the administrative burden of preparing and processing a large number of amendments for those applications filed prior to June 26, 1989. The result of this and other Commission decisions[4] is that by the end of 1990, the Commission will have disposed (by grant out of hearing, dismissal, or designation for hearing) of virtually all[5] of the approximately 2,560 new and major change applications pending on June 26, 1989. With so few applications remaining that would fall within the class of applicants required to amend under Sound's proposal, Sound's concerns are largely moot.

6. In light of our experience, we decline to require those few applicants whose currently pending applications were filed prior to June 26, 1989, to amend their applications. Such a requirement, to the extent it would not be moot by the time it becomes effective, would further delay disposition of applications already among the "oldest" of the applications now pending before the Commission. We do not believe further delaying the disposition of such applications would serve the public interest.

7. Accordingly, IT IS ORDERED THAT the "Petition for Reconsideration" filed by Sound Broadcasting Co. and Field Broadcasting Co. IS DENIED.

8. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Form 301 is used to apply for authority to construct new commercial AM, FM or TV broadcast facilities, and to make changes in existing facilities. The amendments adopted did not affect applicants seeking authority to make changes in existing facilities. *Report and Order*, 4 FCC Rcd at 3853 n.6.

[2] Section II of the revised Form 301 was modified to require applicants to provide additional information about their structure and enabling documents, as well as to identify and provide additional information concerning all equity owners. Section III, as modified, requires applicants to submit an estimate of the cost of construction and to identify their funding sources. Finally, a new Section IV-B requires applicants to report information concerning quantitative and qualitative comparative credit that will be claimed for integration of ownership into management.

[3] *See Report and Order* in BC Docket No. 80-90, 94 FCC 2d 152 (1980). Changes to the Commission's technical rules made possible allotment of approximately 700 new channels in a subsequent proceeding, MM Docket No. 84-231. *See First Report and Order* in MM Docket No. 84-231, 100 FCC 2d 1332 (1985) (subsequent history ommitted). Those changes also made possible a large number of additional allotments at later dates.

[4] *See, e.g., Public Notice*, 5 FCC Rcd 990 (1990).

[5] For example, as of October 1, 1990, approximately 15 percent of the new and major change applications filed prior to June 26, 1989 remained to be processed by the Commission. In particular, Sound's application for Channel 254A at East Lyme, Connecticut, has been designated for hearing. *See Hearing Designation Order*, 5 FCC Rcd 2693 (MM Bur. 1990). Field's application for Channel 247A at Litchfield, Connecticut, has also been designated for hearing. *See Hearing Designation Order*, 5 FCC Rcd 5402 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-440

In re Applications of

McCLENAHAN BROADCASTING, INC.	File No. BPH-870429MI
SPECTRUM BROADCASTING CORP.	File No. BPH-870430MB
COMMUNICATION AUDIO VIDEO CORPORATION	File No. BPH-870430MJ

For a Construction Permit for
New FM Station, Channel 298A,
Charlottesville, Virginia

Appearances

Richard J. Bodorff, Jonathan W. Emord, W. Edward McClenahan, on behalf of McClenahan Broadcasting, Inc.; *Margot Polivy* and *Katrine Renouf*, on behalf of Spectrum Broadcasting Corp.; and *John M. Brown*, on behalf of Communication Audio Video Corporation.

DECISION

Adopted: November 14, 1990; Released: December 4, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Chairman MARINO:

1. Following a three-applicant comparative hearing, Spectrum Broadcasting Corp. (Spectrum) was selected by Administrative Law Judge Joseph Chachkin (ALJ) as the superior comparative applicant for a new FM broadcast station at Charlottesville, Virginia. *Initial Decision*, 5 FCC Rcd 3170, 3187 (1990)(I.D.). The unsuccessful applicants, McClenahan Broadcasting, Inc. (McClenahan), and Communication Audio Video Corp. (CAVC), filed exceptions, and Spectrum filed contingent exceptions. Oral argument was held on October 17, 1990. The decisional questions raised by the written and oral arguments are: (1) Whether CAVC should have been disqualified on false certification, candor, reporting, and financial qualification grounds, I.D., paras. 118-137; (2) Whether the ALJ erred in finding that Spectrum was entitled to 100% quantitative integration credit, *id.*, para. 140-142; and (3) Whether the record supports the finding that "Spectrum is qualitatively superior" because its "100% minority enhancement and superior female enhancement outweigh McClenahan's edge under the [service area] residence, civic involvement and broadcast experience criteria." *id.*, para. 144. We will affirm the ALJ's selection of Spectrum for the reasons set out below.

QUALIFYING ISSUES

2. CAVC excepts to its disqualification under a false financial certification issue; a misrepresentation or lack of candor issue relating to the deposition testimony of John M. Brown, its president and sole voting shareholder, concerning his "non-voting" shareholder financial supporters; a reporting issue as to whether CAVC timely amended to show it was not financially qualified; and a financial qualifications issue. It acknowledges that Brown's "financial certification may have been unknowingly defective" (Br. at 8), but contends that he "made a good faith attempt to assure that the needed funds would be available" (*id.* at 9), that he had "good reason" to believe that CAVC's original limited partners, by contract, remained limited partners obligated to fund CAVC's proposal far beyond their "expressed" "desires" (*id.* at 13, 15), and he thus had no obligation to report that they had "departed" or that CAVC was "financially unqualified," and that "CAVC is [now] financially qualified" (*id.* at 22).

3. It is plain from the record evidence adduced in this case that CAVC was not financially qualified at the time of certification, requiring denial of CAVC's application, *see Janice Fay Surber*, FCC 90R-64, released October 24, 1990, paras. 26-27; therefore, we will not reach "the more subjective question of whether there also existed a 'conscious intent to deceive' when the applicant certified it was financially qualified." *Texas Communications Limited Partnership*, FCC 90R-90, released October 17, 1990, para. 8. *See also Janice Fay Surber, supra* ; *Aspen FM, Inc.*, 5 FCC Rcd 3196, 3199 (Rev. Bd. 1990). Similarly, for the reason noted above, CAVC is not entitled to now rely on a financial commitment from James L. Jessup, Jr. (which, in any event, the ALJ found unavailable), purportedly obtained in May 1989, some twenty-five months after Brown's initial certification, to demonstrate its current financial qualifications. *Marlin Broadcasting of Central Florida, Inc.*, FCC 90-320, released October 4, 1990; *Mableton Broadcasting Co. Inc.*, FCC 90R-99, released October 30, 1990 n. 36; *Janice Fay Surber, supra*, n. 1.

4. BACKGROUND: On April 30, 1987, Brown, CAVC's president and sole stockholder certified CAVC's financial qualifications. To support this certification, he relied on a letter dated April 30, 1987, signed by Lindsay R. Barnes, Jr. and Robert M. Callaghan, two Charlottesville lawyers. I.D., para. 55. The letter provided in pertinent part:

> It is our understanding that Communication Audio Video Corporation possesses 2500 treasury shares of preferred, non-voting stock. We also understand that such stock is, in terms of equity participation, equal to its common, voting stock counterpart, of which 1980 shares are presently issued to John M. Brown, Sr. *Pursuant to terms set forth below, we hereby subscribe to purchase a 49 % equity participation in the corporation* through the preferred stock shares presently held in the corporation's treasury.

As consideration for such purchase, we hereby propose to provide the following : (a) $5,000. in loan monies for use by the corporation and its principals in filing a Class A FM broadcast application, for a Charlottesville allocation, with the Federal Communications Commission, *(b)* excepting any practice of communications law (a specialty not practiced by the undersigned), *various legal and counseling services for the applicant corporation* and its principals during the period of time between the April 30, 1987 application filing date and the designation hearing by the appropriate Administrative Law Judge, *and (c)* conditioned upon the applicant corporation's receipt of a construction permit from the FCC, *service as guarantors for an amount (not to exceed the sum of $100,000.) to be available to address any defaults by the corporation in servicing its financial commitments in the first three months of on - air operation.*

MBI Exh. 15 (emphases added) [1]. Although the precise amount of CAVC's estimated costs is unclear on the record (*see I.D.*, para. 136), it is undisputed that they are at least $100,000, an amount significantly higher than the $5000 figure promised by Barnes and Callaghan in the above letter. Brown claimed, however, that he failed to notice the funding deficiency until more than two years later when false financial certification, misrepresentation or lack of candor, and reporting issues were added against CAVC. I.D., para. 58. As justification for this omission, Brown argues that only a few days before receipt of the April 30 letter, Barnes had dictated a Memorandum of Understanding in which, on behalf of himself (Barnes) and other investing individuals, he indicated that they would provide up to $100,000 for use "upon initiation of station operation" (MBI Exh. 16). It was this "Understanding," plus Brown's asserted confusion surrounding the term "guarantor," that purportedly caused Brown's oversight. The Memorandum was not executed, however, and the record does contain testimony that Barnes told Brown before the application filing date that Barnes did not want to pledge his monetary assets or lock up his liquid assets for a long period of time. I.D., para. 52.

5. In any event, Brown (who had only contemplated giving up 40%) admits he was distressed by the 49% non-voting interest indicated in the letter; and, thus, he informed Barnes of his displeasure in May 1987, one month after the application was filed. *Id.*, para. 82. Callaghan, the other non-voting investor, who was promptly advised of Brown's conversation with Barnes, indicated he would step aside in return for his portion of funds given CAVC ($2500), if there were a change in the ownership percentage. *Id.* Callaghan's money was, in fact, returned within ten days to two weeks later (Tr. 656-659); and Callaghan had no subsequent relationship to CAVC. *Id.* Similarly, Barnes sent a letter to Brown dated September 16, 1987, severing his relationship with CAVC. That letter (MBI Exh. 20) states in relevant part:

> Dear John:
>
> After giving considerable thought to my participation as a stockholder in your corporation, I have reluctantly concluded that, at least for the foreseeable future, my best interests are served by declining to participate as such. Thus, I return, without execution, the stock subscription agreement prepared by George Dygert.
>
> At your earliest convenience, I ask that you forward a check in the amount of $2,500.00 as reimbursement of the funds loaned for the purpose of meeting your April 30 filing deadline. You need not add any interest to the principal amount; consider the interest-free loan as my contribution, however small, toward attainment of your goal. Upon receipt of the $2,500.00, I shall cancel and return for your files the April 30 note in the amount of $5,000.00.
>
> John, I wish you well in the pursuit of your FM license. In the months ahead, I hope you will not hesitate to call upon me for whatever assistance you feel I may be able to provide.

6. Brown asserted before the ALJ that, under state law, Barnes and Callaghan remained contractually obligated as non-voting shareholders to finance CAVC's proposal until they were explicitly released from their obligations by CAVC, which, the applicant argues, occurred over a year later, in October 1988, when Brown purportedly brought other investors into the corporation. CAVC Br. at 17-18. CAVC concedes that litigation might have been required to secure the Barnes and Callaghan financial commitment. Br. at 14. Finally, in May of 1989, James L. Jessup purportedly became the 49% non- voting shareholder of CAVC. I.D., para. 103.

7. DISCUSSION: To implement 47 U.S.C. §308(b), the Commission requires that an applicant for a broadcast facility must be financially qualified before its application may be granted; that is, the applicant must have "reasonable assurance" of sufficient net liquid assets on hand, or sufficient funds available from committed sources, to construct and operate the proposed facilities for three months without revenue. *See JAM Communications, Inc.*, 4 FCC Rcd 3754, 3757 (Rev. Bd. 1989); *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990). Moreover, where, as here, the applicant certifies in its application that it is financially qualified, the appropriate inquiry upon specification of a financial qualifications issue is simply whether the applicant did in fact have at the time it certified its financial qualifications, reasonable assurance of the funds necessary to construct and operate its proposed facility. *Aspen FM, Inc., supra* ; *see also Marlin Broadcasting of Central Florida, Inc., supra*. In other words, where an applicant's certification had no objective basis *ab initio*, the applicant may not rely on a later financial commitment to support its earlier certification. *Marlin, supra* ; *Mableton Broadcasting Co., Inc., supra* at n. 36; *Janice Fay Surber, supra* at n. 1.

8. An applicant "must adduce probative evidence" to meet its burden that it did in fact have a reasonable assurance of funds at the time of certification. *Northampton Media Associates*, 4 FCC Rcd 5517, 5518 (1989). Probative evidence, the Commission has held, necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds. 4 FCC Rcd at 5519. Finally, and it appears applicable here, an applicant who loses "reasonable assurance" after it has filed its application must promptly within 30 days report that fact to the Commission pursuant to 47 C.F.R. §1.65. *See Belo Broadcasting Corp.*, 42

FCC 2d 520 (Rev. Bd. 1973); *Tri-State Communications*, 4 FCC Rcd 8258 (Rev. Bd. 1989), *recon. denied*, 5 FCC Rcd 534 (Rev. Bd. 1990), *review denied*, FCC 90-347 released October 23, 1990. Any subsequent attempt to amend to reestablish "reasonable assurance" requires the applicant also to meet the "good cause" test set forth in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970). *Edwin A. Bernstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 2843 (1990).

9. Here, it is clear that the applicant's financial certification was flawed from the outset -- CAVC virtually concedes as much (albeit claiming it was unknowingly defective). On its face, the April 30 letter simply indicated that the non-voting shareholders would provide only $5000 in loans as well as legal services, and would act as "guarantors" for an amount up to $100,000 to "address any defaults . . . in servicing its financial commitments in the first three months of on-air operation." Like the ALJ, who observed the witnesses, "we are highly skeptical that [Brown] truly believed [he] had 'reasonable assurance' of a 'present firm intention' of [the non-voting shareholders making] funds available to [him]," *Janice Fay Surber*, *supra*, at para. 27. In any event, the mere fact that CAVC failed to meet the objective standard of "reasonable assurance" of adequate funding when certifying, requires CAVC's disqualification under the financial qualifications issue. *Id.* ; *see also Marlin Broadcasting of Central Florida, Inc.* ; *Aspen FM, Inc., supra.*

10. Moreover, even assuming, *arguendo*, that Brown had had a valid justification for initially certifying CAVC's financial qualifications (a prerequisite for meeting the good cause test for subsequent financial amendments, *see Albert E. Gary*, FCC 90R-96, released October 23, 1990), CAVC's "reasonable assurance" quickly vanished when Brown objected to Barnes' and Callaghan's 49% equity interest, and refunded their money. Notwithstanding that Brown may have possessed a legal remedy against Barnes and Callaghan for funds to finance CAVC's proposal, we have previously held that "potential funds obtained under legal process are far less than what the Commission contemplates in presuming the kind of ready liquidity necessary to establish financial qualifications." *Roxanne Givens*, 5 FCC Rcd 5371, 5374 (Rev. Bd. 1990). We further stated in *Givens* (*id.*):

> '[t]he first principle . . . is that those filing an application for a broadcast construction permit be *ready*, *willing* and *able*' to construct and operate as proposed. *Dutchess Communications Corp.*, 101 FCC 2d 243, 254 (Rev. Bd. 1985). It is difficult to conceive of an applicant less ready to construct and operate a station than one dependent on the vicissitudes of legal process for securing requisite funds.

In sum, the ALJ correctly found that CAVC had not met its burden of proof under the financial qualifications issue and that the applicant, therefore, was not entitled to compete with Spectrum and McClenahan on the Commission's comparative factors for selecting the best qualified applicant. *See Lewis Adelman*, 29 FCC 1223 (1960), *aff'd sub nom. Guinan v. FCC*, 297 F.2d 782 (D.C. Cir. 1961)(only qualified applicants entitled to comparative consideration).

COMPARATIVE ISSUE

11. *Sham allegation* : Under the Commission criteria for selecting the best comparative applicant, *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), the I.D. found little differences between Spectrum and McClenahan: both were awarded 100% quantitative "integration" credit for proposing to integrate their entire voting ownership into station operations; neither was assessed a diversification demerit for other attributable media interests; and both were credited as proposing installation of an auxiliary transmitter. The pivotal distinction between the applicants was the respective qualitative attributes accorded the integrated owners. I.D., para. 144. McClenahan, however, excepts to the ALJ's award of 100% quantitative credit to Spectrum, contending that that applicant is a sham fabricated solely to skew the comparative process. Essentially, it argues:

> that one voting principal of Spectrum, Ms. Deborah Royster, a Washington attorney with communications experience who was *not* a local resident of Charlottesville, did *not* have any civic involvement there and had *no* broadcast experience, structured this applicant in order to exploit the Commission's qualitative enhancement criteria.

Br., at 3.

12. By way of background, Spectrum is a Virginia corporation comprised of three voting shareholders: Royster, with 51.2% of the voting stock and a 35.8% equity interest overall; Alicia B. Lugo, 24.4% voting stock and 4.6% equity, respectively; and Henry K. Truzy, Jr., also with 24.4% and 4.6%, respectively. I.D., para. 28. Lugo, a Black female, and a life-long Charlottesville resident with extensive civic activities, is proposed as public affairs director. *Id.*, para. 36-37. Truzy, a Black male and Charlottesville resident since 1984, is currently an announcer, music director and night program director at Stations WINA-WQMZ, Charlottesville. He will resign that position in the event of a grant of Spectrum's application and will serve as the station's program director. *Id.*, paras. 38-39. Royster will serve as the station's general manager. She previously worked as a news assistant for six months in 1976 at Channel 5 in Washington, D.C. *Id.*, para. 35. She was also a Charlottesville resident while attending law school. The ALJ noted in his findings:

> Ms. Royster, then an attorney with Reed, Smith, Shaw & McClay including Pierson, Ball & Dowd, with experience in communications law practice and representation of clients in comparative broadcast hearings, first became aware of the availability of the channel while at work in her law firm office sometime in 1984 or 1985 (Tr. 355-356; 362). She was involved with a broadcast matter at the time and was doing work in the communications area when she became apprised of the channel's prospective availability (Tr. 362). Ms. Royster recalls that the window opened for the channel sometime in February or March of 1987 (Tr. 364). When the window opened, Ms. Royster contacted a Mr. George Bates (a prospective non-voting stockholder in the applicant) and asked him if he knew people involved in radio in Charlottesville who wanted to

> work in radio and if he could help her identify investors (Tr. 374). She also informed him that she was interested in finding people who lived in Charlottesville and who knew the community (Tr. 375; 379). It was Ms. Royster's intention to establish a minority-owned radio station (Tr. 379).

I.D., at para. 29.

13. Based on Royster's central role in creating the applicant and prosecuting the application, coupled with the relatively passive conduct and small financial contributions of both Lugo and Truzy, neither of whom was acquainted with Royster prior to the formation of the applicant, McClenahan contends that Lugo and Truzy are not, in actuality, *bona fide* owners of Spectrum and that they will not have a genuine input in the applicant's decision processes.

14. DISCUSSION: The Commission looks to voting ownership that is proposed fulltime in station management in order to determine the quantitative percentage to which an applicant is entitled for integration credit, *VOB Incorporated*, FCC 90R-91, released October 17, 1990, para. 4, providing, that "there has been a good faith division of ownership and whether it appears from the record that [the principals in question] will have a legitimate interest and influence in the [applicant] to warrant . . . confidence that [their] participation in the station's operations will be consistent with the purposes behind the integration criterion." *KIST Corp.*, 102 FCC 2d 288, 291 (1985), *aff'd by judgment sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986). It is "not improper for an applicant to structure its proposal in a manner that is believed most likely to prevail in a comparative proceeding *if* the proposal is *bona fide*. " *Id.*, at n. 9 (emphases in original). And there is no prohibition against the majority principal leading the way in prosecuting the application, providing the other active principals play true and actual roles in management. *Vela Broadcasting Co.*, 2 FCC Rcd 3663, 3667 (Rev. Bd. 1987). The test for determining whether the applicant is a sham is the totality of the record evidence. *Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8159 (Rev. Bd. 1989), *aff'd* , FCC 90-294, released September 19, 1990.

15. Here, McClenahan has not provided probative evidence sufficient to disregard the ALJ's findings concerning the *bona fides* of Spectrum's application, and the ALJ persuasively answers McClenahan's objections about the roles played by Spectrum's principals (I.D., para. 140):

> In essence, McClenahan contends that because most of the work of preparing the application was done by Royster, the largest single stockholder, no other owner may receive integration credit. McClenahan's contention is rejected. The fact that Royster has played the major role in the application stage is of no consequence particularly, where, as here, Royster is the largest single shareholder. Also, unlike the other participating owners, Royster is a lawyer with some familiarity with the Commission's processes. Under the circumstances, Royster was the appropriate principal to have prime responsibility for the preparation and prosecution of Spectrum's application.

Neither Lugo nor Truzy was a Spectrum principal when many of the pre-formational activities were completed. *Id.*, para. 30. Thereafter, the I.D. found that Truzy and Lugo had participated in the application preparation and prosecution, and both were fully familiar with the duties they would perform. *Id.*, para. 140. Lugo and Truzy have satisfied their respective capital contributions of $500, and each possesses a desirable background for his and her respective proposed positions. That is, Lugo's role as public affairs director and liaison to area community leaders naturally follows in the wake of her extensive prior local activities with the Charlottesville civic organizations, as does Truzy's position as the station's program director in light of his current position as night program director at a local Charlottesville station. In sum, we concur with the ALJ's assessment that there is "not a shred of evidence indicating that Truzy and Lugo will not carry out their integration proposals." I.D., para. 140. Thus, Spectrum is entitled to the 100% quantitative credit awarded by the ALJ.

16. *Qualitative Analysis* : As with Spectrum, the ALJ awarded McClenahan 100% quantitative integration credit. McClenahan is a Virginia corporation comprised of W. Edward McClenahan and his wife, Donna M. McClenahan. I.D., para. 6. Mr. McClenahan owns 51% of the stock and proposes to serve as the station's general manager. *Id.* Ms. McClenahan, in turn, own's the remaining 49% and would work as the station's operations director "coordinating operations policies among the various station departments and supervising the staff involved with station sales, budgeting, purchasing, bookkeeping, traffic, production and financial planning." *Id.* at para. 21. The McClenahans have lived within the proposed station's 70 dbu contour since 1970 and each was active in Charlottesville-Albermarle civic activities during the 1970s to mid 1980s. *Id.*, paras. 11-15, 22-24. Mr. McClenahan also has managerial broadcast experience dating back to 1953, while his wife worked in various broadcast activities from 1958-1981. *Id.*, para. 25.

17. In determining that Spectrum was qualitatively superior over McClenahan, the ALJ noted:

> Spectrum receives substantial minority enhancement for its 100% integration ownership. McClenahan receives no such credit. Also, Spectrum proposes 75.6% female enhancement as opposed to McClenahan's 49%. On the local residence factor, Spectrum's Alicia Lugo (24.4%) is a lifelong resident of Charlottesville and Henry Truzy (24.4%) has lived there since 1984. Deborah Royster also receives slight credit for her promise to move to Charlottesville. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965); *Bradley, Hand, and Triplett*, 89 FCC 2d 657 (Rev. Bd. 1982). McClenahan's integrated principals are long term residents of the service area but have never lived in the principal community. Residence in the principal community to be served is of primary importance. *Policy Statement, supra*, 1 FCC 2d 393, 396; *see also Renee Marie Kramer*, 5 FCC Rcd 563 (1990) . . . . Since the McClenahan's have never resided in the principal community, McClenahan rates only a slight edge on the residence factor. With respect to civic activities, although not of recent vintage, the McClenahan's showing is superior to that of Spectrum. Although Lugo has a long history

> of worthy affiliations, Truzy's involvement is of very recent vintage and Royster claims no civic participation. McClenahan receives a slight preference. McClenahan's 100% broadcast experience is also superior to that of Spectrum (24.4%). In this connection, past broadcast experience is of only minor significance in comparing applicants for permanent broadcast authorizations. *See Policy Statement, supra*, 1 FCC 2d at 396. In summary, Spectrum's 100% minority enhancement and superior female enhancement outweigh McClenahan's edge under the residence, civic involvement and broadcast experience criteria.

I.D., at para. 144. McClenahan argues, however, that its integration proposal is qualitatively superior: the ALJ gave too little weight to its preferences for local residence and civic activities, and too much weight for Spectrum's racial and gender preferences. Spectrum, in its contingent exceptions, would diminish the preference accorded the civic activities of both McClenahans, arguing that most of the activities were performed as part of, or in conjunction with, the McClenahans' then current employment.

18. *Discussion* : In choosing between applicants which have virtually equal quantitative "integration" proposals, the Commission looks to the qualitative attributes of the participating owners (*i.e.*, local residence, civic participation, minority ownership, female ownership, and past broadcast experience). *See Miracle Strip Communications*, 4 FCC Rcd 5064, 5065 (1985), citing the *Policy Statement*, *supra*, and *Waters Broadcasting Corp.*, 91 FCC 2d 1260, *aff'd sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984). Each of these factors is not accorded equal weight. Both local residence and minority ownership are fundamental considerations in this qualitative analysis and receive the greatest weight. *See Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985). The Commission has held that "minority ownership and local residence have equal significance in choosing the comparatively superior applicant." *Id.* With respect to residence, the Commission has declared that, "[g]enerally speaking, residence in the community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area. Proposed future local residence . . . will also be accorded less weight than present residence of several years' duration." *Policy Statement*, 1 FCC 2d at 396. Minority participation has more significance as an enhancement factor than female participation. *Horne Industries*, 56 RR 2d 665, 666 (1984); *Marlin Broadcasting of Central Florida, Inc.*, *supra* FCC 90-320, released October 4, 1990, at n. 10. Past broadcast experience is deemed of minor significance since it confers only an initial advantage. *Policy Statement*, 1 FCC 2d at 396. There is also precedent suggesting that civic enhancement may be of equal or greater weight than female ownership. *Talleyrand Broadcasting*, 103 FCC 2d 476, 481 (Rev. Bd. 1985); *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 11, 186 (Rev. Bd. 1986) (subsequent history omitted). Finally, we note that the percentage of qualitative credit awarded is proportionate to the quantitative ownership of the respective principal; that is, if a 25% participating owner is the applicant's only local resident, the applicant is entitled to 25% local residence credit. *See Debra D. Carrigan*, 104 FCC 2d 826, 833 (1986)(subsequent history omitted).

19. Applying the above principles to the facts of this case, and weighing the respective factors against one another, we note at the outset that the 100% minority enhancement awarded Spectrum has more significance than the 100% service area residence preference accorded McClenahan. Although residence in the community of license is equal in weight to minority ownership, *see Radio Jonesboro, supra*, the McClenahans here were credited only with long-term residence in the proposed service area, generally of lesser weight. *Policy Statement, supra*. Additionally, Spectrum is entitled to local residence credit in its own right, since Lugo (a 24.4% shareholder) is a life-long resident of Charlottesville, and Trugy (also a 24.4% shareholder) has lived in Charlottesville since 1984. Moreover, Royster proposes to move to Charlottesville. Thus, credit which would accrue for 48.8% local residence and 51.2% proposed residence must also be factored into the total comparison between Spectrum and McClenahan.

20. Spectrum also enjoys a superiority of 26.6% female ownership over McClenahan (*i.e.*, an aggregate of 75.6% for Royster's 51.2% and Lugo's 24.4%, versus Ms. McClenahan's 49%). This is sufficient to offset McClenahan's superiority for local civic participation. In arriving at McClenahan's civic credit, we have not diminished or discounted the weight accorded those activities on grounds they were coterminous with the McClenahan's employment, as requested by Spectrum. The *Policy Statement* asserts that "mere diversity of business interests" will not be considered for civic enhancement purposes. 1 FCC 2d at 396; *see generally Jarad Broadcasting Co., Inc., supra* 1 FCC Rcd at 185 (bare claim of familarity with local scene resulting from service area magazine position inadequate to receive civic credit) (subsequent history omitted); *Broadcast Associates of Colorado*, 100 FCC 2d 616, 618-619 (Rev. Bd. 1985)(no credit for merely reporting activities on community events for local broadcast stations)(subsequent history omitted). However, the *Policy Statement* also provides that past participation in civic affairs, *or any local activities indicating a knowledge and interest in the welfare of the community is entitled to an enhancement credit. Id.* And in Newton Television Ltd., 3 FCC Rcd 553, 555 (Rev. Bd. 1988), the Board rejected an analogous argument that principals could not confer civic enhancement on an applicant for activities ancillary to their church work. The Board explained that the "enhancement . . . for a principal's prior civic activities is not, in any sense, a free-floating gratuity for communal 'good deeds,' but is considered, rather, a barometer of an 'integrated' principal's empirical 'knowledge of and interest in' the contemporary problems, needs, and interests of the proposed station's service area." 3 FCC Rcd at 555.

21. Here, in addition to being a member of various local civic organizations, Mr. McClenahan served, as Publicity Director of the American Red Cross Charlottesville Chapter and Divisional Chairman of the Fund Raising Committee for two years. *I.D.*, paras. 12-15. Ms. McClenahan also served as the Chair of the Publicity Committee of the Charlottesville/Albermarle Cancer Award. *Id.*, para. 24. Those activities are sufficient to warrant civic enhancement credit. The weight awarded McClenahan's civic quantitative superiority over Spectrum (100% versus 24.4%) is reduced in light of the extensive qualitative nature of Lugo's involvement with the community detailed in para. 37 of the I.D., *Cf. North*

Carolina Radio Service, Inc., 92 FCC 2d 621, 623 (Rev. Bd. 1982)(breadth offset length of broadcast experience), *review denied*, FCC 83-211, released May 3, 1983, persuading us that, on balance, McClenahan's civic enhancement preference does not outweigh Spectrum's female preference.

22. The final element to be accounted for in the comparative calculus is McClenahan's past broadcast experience, which quantitatively (100%) and qualitatively outweigh Spectrum's 24.4% broadcast experience credit for Truzy's participation. As noted above, however, past broadcast experience is deemed of minor significance, too little to prevail over the remaining plus factors Spectrum enjoys after McClenahan's other preferences have been offset (*i.e.*, Spectrum's 48.8% local residence for Lugo and Truzy, and 51.2% Royster's proposed residence, and the difference in weight between minority and service area residence).

23. In light of our disposition, we do not reach Spectrum's contingent exception challenging the quantitative integration credit awarded McClenahan for Ms. McClenahan's proposal. Moreover, *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990), decided subsequent to the filing of McClenahan's exceptions, squarely rejects McClenahan's contention that comparative enhancement credit based on race is unconstitutional; and, as to a similar challenge to female enhancement credit, the Board is legally obligated not to depart from the Commission's existing policy. *See The Baltimore Radio Show, Inc.*, 5 FCC Rcd 3712 (1990).

24. ACCORDINGLY, IT IS ORDERED, That the Motion to File Brief and Partial Exceptions One Day Late, filed June 22, 1990 by Communication Audio Video Corporation IS GRANTED; that the Request for Right to File Supplemental Brief and Partial Exceptions to Initial Decision, filed July 26, 1990 by Communication Audio Video Corporation IS GRANTED; and that the Motion to Dismiss for Failure to Prosecute, filed June 28, 1990 by McClenahan Broadcasting, Inc. IS DENIED, and

25. IT IS FURTHER ORDERED, That the application of Spectrum Broadcasting Corp. (File No. BPH-870430MB) for a construction permit for a new FM Station on Channel 298A at Charlottesville, Virginia IS GRANTED; and that the applications of McClenahan Broadcasting, Inc. (File No. BPH-870429MI) and Communication Audio Video Corporation (File No. BPH-870430MJ) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTE

[1] The official public docket contains two sets of MBI exhibits which bear common exhibit numbers, but differ in subject matter. A review of the hearing transcript reflects that the exhibit numbers that correspond to the documents as identified and received at hearing are found in Exhibit Volume Two, and it is these exhibit numbers that were used by the ALJ, CAVC's brief, and in this Decision.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-82

In re Applications of

VIRGIL L. PEARMAN	File No. BPH-871110MK
W & B BROADCASTING, INC.	File No. BPH-871110MU

For Construction Permit for New FM Station, Channel 278A, Radcliff, Kentucky

MEMORANDUM OPINION AND ORDER

Adopted: November 19, 1990; Released: December 4, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board is a Petition for Limited Reconsideration filed on October 10, 1990 by W & B Broadcasting, Inc. (W & B), the prevailing applicant in our *Decision*, 5 FCC Rcd 5697 (Rev. Bd. 1990). W & B requests that paragraph 16, and n. 5, of that document be modified to delete the requirement that W & B principal William G. Walters divest himself of his 50% non-voting equity interest in a pending application for construction permit for a new FM station at Campbellsville, Kentucky (File No. BPH-891012MH).

2. *Background*: In W & B's application (FCC Form 301) filed in this proceeding on November 10, 1987, W & B represented that "William G. (Bill) Walters will divest all interests in other radio stations prior to commencement of program tests by W & B's Radcliff FM station" (FCC Form 301, Exhibit 1). In his *Initial Decision*, 5 FCC Rcd 1830 (1990), the Administrative Law Judge (ALJ) repeated this representation of Walters (at para. 8), and concluded (at para. 14) that W & B had no attributable media interests because, *inter alia*, "Walters has said he will divest all his interests." W & B did not file any exceptions to these findings and conclusions of the ALJ.

3. In W & B's Integration and Diversification Statement filed on June 28, 1989 (some four months prior to the filing of the Campbellsville application), Walters executed a statement that W & B would divest itself of WASE, Ft. Knox, Kentucky, and Walters would divest his interest in WEKY, Richmond, Kentucky. Subsequently, in W & B's Hearing Exhibit 1 (executed by Walters on November 6, 1989, some three weeks after the Campbellsville application was filed), it was represented that the WASE and WEKY interests would be divested, and that "[o]ther than the above, neither W & B Broadcasting, Inc. nor any of its principals have *any* interest in *any* medium of mass communications" (emphases added).

4. In its Petition, W & B argues only that neither it nor Walters made any commitment to divest of "any interest in any radio stations in Campbellsville" because pending applications are not cognizable in another proceeding for diversification purposes under the standard comparative issue. Thus, W & B requests that our *Decision* be modified.

5. *Discussion*: While W & B is correct in its reliance on *Washington's Christian Television Outreach, Inc.*, 59 RR 2d 787, 790 (1985) (subsequent history omitted) (" . . . no logical reason to require pre-cutoff divestiture for interests which have not yet been acquired"), it did not except to the specific conclusions of the ALJ that "Walters . . . will divest of all his interests." Nevertheless, we will grant W & B's petition to allow it to conform to extant precedent, and to permit it to rectify any confusion that may have arisen from its various representations, including the specific claims made with respect to WASE and WEXY.[1]

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Limited Reconsideration, filed October 10, 1990, by W & B Broadcasting, Inc., IS GRANTED, and the Review Board's *Decision*, 5 FCC Rcd 5697 (Rev. Bd. 1990), IS MODIFIED (at paragraph 16 and n. 5) to delete the requirement that William G. Walters divest himself of his interest in a pending application for construction permit for a new FM facility at Campbellsville, Kentucky (File No. BPH-891012MH).

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] *But see Decision*, 5 FCC Rcd at 5698, where, in response to exceptions filed by Pearman that Walters was implicated in a "sham" application, we indicated that "should it develop in the [yet to be designated] Campbellsville proceeding that Walters has acted improperly [in filing a sham application], this matter can be revisited and appropriate action taken."

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-592

In the Matter of

Amendment of Section 73.202(b), RM-7074
Table of Allotments,
FM Broadcast Stations.
(Oak Grove and Bastrop, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1990; Released: December 6, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by 96.7 FM Radio, Inc. (petitioner), licensee of Station KWCL(FM), Oak Grove, Louisiana, requesting that the Commission substitute Channel 244C2 for Channel 244C3 at Oak Grove[1] and modify its license to reflect operation on the higher powered channel. In addition, petitioner requests that Channel 248A be substituted for proposed Channel 247A at Bastrop, Louisiana, to accommodate the upgrade.

2. We believe the public interest would be served by consideration of petitioner's proposal because it would result in the allotment of a wide area FM service to Oak Grove. Channel 244C2 can be allotted to Oak Grove, and Channel 248A can be allotted to Bastrop, in compliance with the Commission's minimum distance separation requirements at the site proposed by petitioner.[2] Channel 277A is presently allotted to Bastrop. However, the Commission has proposed the substitution of Channel 247A for 277A at Bastrop. *See Notice of Proposed Rule Making* (MM Docket No. 89-85), 4 FCC Rcd 3725 (1989). If that request is denied, there will be no need to alter the 277A allotment at Bastrop. If that request and the instant petition are granted, the applicant may amend its application to specify operation on Channel 248A without loss of cut-off status, since no upgrade in class of channel will result from the change. [3]

3. Therefore, as requested, we propose that Channel 244C2 be substituted for 244C3 at Oak Grove, Louisiana and that Channel 248A be substituted for proposed Channel 247A at Bastrop in order to accommodate the upgrade proposed by petitioner. We also propose to modify the license of Station KWCL(FM) to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Oak Grove.

4. Accordingly, for the above reasons, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Oak Grove, Louisiana	244C3	244C2
Bastrop, Louisiana	230C2,261C2, 277A	230C2,248A, 261C2

5. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicant for Channel 277A at Bastrop, as follows: Max Broadcasting Co., 3712 Cornell Drive, Shreveport, LA 71107.

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **January 28, 1991,** and reply comments on or before **February 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Denise B. Moline, Esq.
McCabe & Allen
P. O. Box 2126
Manassas Park, VA 22111
(Counsel for Petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Fawn Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules
Division Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Channel 244C3 was substituted for Channel 244A at Oak Grove in MM Docket No. 89-192. *See Report and Order,* 5 FCC Rcd 2152 (1990).

[2] The coordinates for Channel 244C2 at Oak Grove are 32-41-25 and 91-36-41, with a site restriction of 28.4 kilometers (17.6 miles), at petitioner's requested site. The coordinates for Channel 248A at Bastrop are 32-46-48 and 91-54-48.

[3] Max Broadcasting Co. filed an application for Channel 277A at Bastrop (BPH-880603MQ). This applicant will be served with a copy of this *Notice.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-593

In the Matter of

Amendment of Section 73.202(b), RM-7538
Table of Allotments,
FM Broadcast Stations.
(Boyne City, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 8, 1990; Released: December 6, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Biederman Investments, Inc. (petitioner), requesting the substitution of FM Channel 228C2 for Channel 228A at Boyne City, Michigan. Petitioner also requests modification of its license for Station WCLX(FM), Channel 228A, to specify operation on Channel 228C2. Petitioner submitted information in support of the proposal and stated its intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration since it could provide a wide coverage area FM station to Boyne City, Michigan. Channel 228C2 can be allotted to Boyne City in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site 7.7 kilometers (4.8 miles) southwest.[1] Channel 228C2 is short-spaced to Channel 228A, Station WNBY-FM, Newberry, Michigan. That station was ordered to Channel 229C2 in MM Docket 87-262. *See* 3 FCC Rcd 1878 (1988). Since the allotment at Boyne City is contingent on the licensing of Station WNBY-FM on the new channel, issuance of a license for Channel 228C2 may be withheld until Station WNBY-FM is licensed on Channel 229C2.[2] Since Boyne City is located within 320 kilometers (200 miles) of the U.S.- Canadian border, concurrence of the Canadian government will be requested. We shall also propose to modify the license of Station WCLX(FM), Channel 228A, to specify operation on Channel 228C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. In view of the above, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Boyne City, Michigan	228A	228C2

4. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Order* to the licensee of Station WNBY-FM, Newberry, Michigan:

Jack St. Andre
P.O. Box 501
Newberry, Michigan 49868

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 28, 1991,** and reply comments on or before **February 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dennis J. Kelly
Cordon and Kelly
Second Floor
1920 N Street, N.W.
Washington, D.C. 20036
(Counsel for the petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules. IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 228C2 are 45-10-44 and 85-05-42.

[2] The construction permit for Channel 229C2 at Newberry, Michigan, was granted on February 21, 1989 (BPH-880804ID).

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 78-309

In the Matter of

Amendment of §73.658(i)
of the Commission's Rules,
Concerning Network Representation
of TV Stations in National Spot
Sales

Request of Spanish International
Network (SIN) for Waiver of
§73.658(i)

Request of Telemundo Group, Inc.
for Waiver of §73.658(i)

Request of Latin International
Network Corporation for Waiver
of §73.658(i)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 2, 1990; Released: December 3, 1990

By the Commission:

I. INTRODUCTION

1. In this *Report and Order*, we are terminating this proceeding which considered amending or repealing the "network representation rule"[1] to permit television stations, other than those "owned and operated" by their television network, to be represented by their network[2] in the non-network (spot) sales market. Upon review of the record developed in this proceeding, we have determined that no change in the network representation rule is warranted. At the same time, we also have determined that the "temporary" waivers of this rule granted to Univision, Inc., the Latin International Network Corporation and the Telemundo Group, Inc., will be made permanent. [3]

II. BACKGROUND

2. This proceeding was commenced in 1978[4] to explore possible changes in the Commission's television network representation rule, which prohibits television stations, other than those "owned and operated" by a television network, from being represented by their network in the spot sales market. The Commission initiated the instant proceeding in response to a request from the Spanish International Network (now known as Univision) that it be granted a waiver of the rule so that it could continue to act as the representative of its affiliates in national spot advertising sales. At that time, the Commission granted Univision a temporary waiver of the rule pending resolution of this proceeding and sought comment in the *Notice* about whether it was appropriate to continue to include emerging networks, such as Univision, within the scope of the network representation rule.[5]

3. During its deliberation in this proceeding the Commission initiated, on its own motion, a *Further Notice of Proposed Rule Making (Further Notice)* [6] in 1988 to consider, *inter alia*, additional options in light of more recent developments relating to the applicability of this rule to Spanish-language television network operations, and the growth and development of the electronic media. The *Further Notice* proposed to explore a full range of policy options; first, whether to modify the network representation rule explicitly to exclude emerging networks from the scope of the rule; second, whether to eliminate the network representation rule in its entirety; and, third, whether to retain the network representation rule in its present form, with an appropriate waiver policy. Over twenty parties representing television networks, their affiliates, independent television stations, independent advertising representative agencies, and the Hollywood production community submitted comments. Few commenters support modifying or eliminating the network representation rule; most oppose any change in the rule.

III. DISCUSSION

Network Representation Rule

4. *The Record*. All the "English-language" television affiliates as well as the independent television stations that filed comments oppose any change in the network representation rule. The broadcast affiliates argue that the rule protects them from the networks exerting influence over affiliate programming decisions. The independent stations assert that the rule fosters competition in the local and national broadcast television markets and preserves a maximum base of free local television service. Opposing any change to the rule, the Station Representatives Association (SRA), representing all ten of the independent national television advertising representative agencies, argues that the *Further Notice* is procedurally flawed, that the Commission would exceed its jurisdiction if it were to repeal the rule, and that the networks still exercise substantial influence over their affiliates to clear network programs as well as to employ the network as their spot advertising representative.[7]

5. The major broadcast television networks were the principal parties supporting elimination of the network representation rule.[8] Capital Cities/ABC, Inc. (ABC) states, however, that it has no present intention to enter into the spot sales market, and CBS, Inc. (CBS) filed only a brief statement supporting repeal of this rule, based principally on the argument that the network representation rule is an unwarranted economic limitation on broadcasters. Only the National Broadcasting Company, Inc. (NBC) filed extensive comments supporting the rules' repeal. NBC argued that the evolution of the television market has completely negated the potential for networks exerting undue influence over their affiliates and repeal

would increase competition among national spot representatives by affording affiliates an additional option in choosing their national spot representatives.

6. *Analysis*. The network representation rule, adopted in 1959, is one of a group of television "network" rules intended to affect the relationship between a network and its affiliate stations by proscribing certain commercial practices in the network-affiliate relationship.[9] The network representation rule protects broadcast affiliates from the networks exerting influence over affiliate programming decisions, and the rule fosters competition in the local and national broadcast television markets. While NBC correctly notes that since the rule was adopted there have been numerous changes in the television industry, we do not believe that the weight of the record evidence or our own experience in this area supports a conclusion that there are public interest benefits sufficient to warrant any changes in the rule. Moreover, we recognize that changing the network spot sales rule could affect the competitive balances in the broadcast industry. We are at present conducting a major proceeding concerning the financial interest and syndication rules, 47 C.F.R. §73.658(j).[10] That proceeding could ultimately result in rule changes which might alter certain relationships in the broadcast industry. We believe that it is important not to disturb too many facets of the industry at the same time. We also recognize that our limited resources do not permit resolution of all questions at once. We do not see from the record a great urgency in the need to change the network spot sales rule, particularly in light of the limited degree of interest shown by two of the networks in expanding their role in the national spot sales market. Accordingly, this proceeding will be terminated without altering the present rule.[11]

The Outstanding Waivers

7. The temporary waivers of the network representation rule held by Univision, Telemundo, and Latinet expire with the termination of this proceeding. We sought comment, in the *Further Notice*, on the proper disposition of these temporary waivers.

8. *The Record*. Univision, the Univision Affiliates Council, and Telemundo urged the Commission not to apply the network representation rule to foreign-language television networks. Univision states that as spot sales representative for its affiliates it has enhanced the development of Spanish-language television. Univision contends that traditional national sales firms lack the specialized skills and experience required to market successfully Spanish-language television advertising. Without representation by Univision, these stations may not be represented adequately in the national spot sale field. Univision states that the loss of revenue resulting from the decline in national spot advertising revenue would substantially harm affiliates, threatening the viability of their Spanish-language format altogether. Univision concludes that the public interest would be particularly disserved by applying the network representation rule to the foreign-language networks that have emerged since the rule's inception. The Univision Affiliates Council concur that Spanish-language stations need to be able to be represented by their network because resources of non-hispanic spot representative agencies for providing national spot sales representation for Spanish-language stations are inadequate.

9. Telemundo, a second Spanish-language television network, states that exemption from the network representation rule is essential to the growth and continued viability of its network and its owned and affiliated stations. Telemundo states that: 1) costly educational and marketing efforts are required to further develop the Spanish-language television advertising market; 2) economic and contractual barriers prevent independent representation firms from serving the Spanish-language television advertising market; 3) Spanish-language stations cannot themselves effectively secure national spot advertising sales; and 4) Telemundo could not attract or maintain affiliates if it could not offer national spot advertising representation services. With regard to the Commission's traditional concerns about a network's undue influence over its affiliates, Telemundo states that: 1) its affiliates have not been coerced to use Telemundo's advertising representation services; 2) its affiliates independently determine their national spot advertising rates; and 3) Telemundo does not influence its affiliates operation or program choices.

10. SRA filed comments opposing the Commission's proposal to make the existing waivers permanent. SRA stated that the influence of networks over their affiliates arises whether the network is emerging or traditional. SRA also contends that if Univision were not the dominant national spot representative for Spanish language stations, new, independent representatives would emerge.

11. *Analysis*. Univision began operations as a national spot advertising representative, expanding later into the syndication of Spanish-language programming. When Univision began distributing its programming on an interconnected basis, it became a broadcast "network" within the meaning of the network representation rule. Univision requested a temporary waiver from the rule in 1978 to retain its "rep" business. The Commission granted Univision's request for a temporary waiver, in part, to avoid disrupting Univision's operations. Univision has grown substantially since that time, and now provides Spanish-language programming to affiliates in cities throughout the United States. Univision has grown from a few affiliates in 1978 to over a dozen UHF full-power television stations, and many low power and translator television stations. Univision's programming service is also carried on cable television systems. Telemundo, first launched in 1987, is already an aggressive competitor in the delivery of Spanish-language programming.[12] Both Univision and Telemundo attest to the fact that the waiver has enabled them and their affiliates to grow as providers of foreign-language television programming to the public.

12. Based on over a decade of experience in observing the consequences of our initial waiver to Univision and the overall record herein, it appears clear to us that had we not waived the network representation rule in 1978, the development of the above referenced new foreign-language programming services would have been hampered, if not stifled completely, an outcome clearly inconsistent with the public interest. Moreover, the record evidence in this proceeding shows that the waivers of the network representation rule granted to both Univision and Telemundo continue to provide additional benefits in that they further several of the Commission's longstanding goals: encouraging the growth and development of new networks;[13] fostering foreign-language programming;[14] increasing programming diversity;[15] strengthening competition among stations; and fostering a competitive UHF

service.[16] Accordingly, in light of the public interest benefits set forth above, we find good cause to make these waivers of Section 73.658(i) of our rules permanent.[17]

Procedural Matters

13. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. **Need and Purpose of this Action:** This action is taken to terminate this long-standing proceeding making no change in the network representation rule. The completion of the instant proceeding will resolve the permanent status of the outstanding temporary waivers of the network representation rule.

II. **Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:** None.

III. **Significant Alternatives Considered and Rejected:** The Further Notice also considered amending or eliminating the network representation rule. The Commission rejected these options because it believed that neither the weight of the record evidence nor its own experience supported a conclusion that there are public interest benefits sufficient to warrant any change in the rule.

14. The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981)).

15. Accordingly, IT IS ORDERED that BC Docket No. 78-309 IS TERMINATED.

16. IT IS FURTHER ORDERED that the waivers of Section 73.658(i) of our rules, 47 C.F.R. Section 73.658(i) granted to Univision, Telemundo and Latinet are made permanent.

17. Further information on this proceeding may be obtained by contacting Judith Herman, Mass Media Bureau at (202) 632-6302. 18. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 73.658(i) of the Commission's rules (47 CFR §73.658(i)).

[2] The definition of a network organization, for purposes of this rule, is any organization that provides an identical program to be broadcast simultaneously by two or more interconnected stations. Section 73.658(a) of the rules states "the term 'network organization' as used in this section includes national and regional network organizations. *See* ch. VII, J, of *Report on Chain Broadcasting.* "

[3] Our action herein making the 1978 waivers permanent does not apply to the stations originally licensed to Spanish International Communications Corporation and Bahia de San Francisco Television Company. One of the designated issues in the renewal proceeding involving the SICC/Bahia stations was whether continuing the 1978 waiver for those stations would serve the public interest. By virtue of a settlement agreement approved by the Commission in June 1987, however, those stations are now licensed to a subsidiary of Hallmark Cards, Inc., which also purchased Univision. *Spanish International Communications Corporation*, 2 FCC Rcd 3336 (1987). Thus, the rule by its express terms does not apply to the SICC and Bahia stations. But the settlement agreement under which Hallmark acquired those stations was set aside by the Court of Appeals. *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, No. 87-1285 (D.C. Cir. Jan. 12, 1990), rehearing en banc granted, March 27, 1990. If the transfer of the SICC/Bahia stations to Hallmark is ultimately set aside and the SICC/Bahia renewal proceeding returned to active hearing status, the waiver granted to these particular stations would have to be resolved in the adjudicatory proceeding.

[4] *Memorandum Opinion and Order and Notice of Proposed Rule Making (Notice)* in BC Docket No. 78-309, 43 FR 45895 (October 4, 1978).

[5] On April 22, 1986, the Latin International Network Corporation (Latinet) filed a petition for waiver of the network representation rule and on March 13, 1987, the Telemundo Group, Inc. (Telemundo) also filed for waiver of this rule. On March 26, 1987, the Mass Media Bureau granted temporary waivers of the rule to both Latinet and Telemundo. The Bureau indicated that these temporary waivers would be in effect until such time as the waiver of this rule which authorized Univision to serve as a national representative expires.

[6] 3 FCC Rcd 2746 (1988).

[7] The Motion Picture Association of America, Inc. offers similar arguments in opposition to any change in the network representation rule.

[8] While Univision, its affiliates, and Telemundo also filed comments supporting elimination of the network representation rule, the major focus of their comments was that the Commission exempt foreign-language stations from the network representation rule.

[9] Section 73.658 of our rules. (47 CFR §73.658.)

[10] *See Evaluation of the Syndication and Financial Interest Rules*, MM Docket No. 90-162.

[11] *See Williamson v. Lee Optical Co.*, 348 U.S. 48, 489 (1955); *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1207, 1210-11 (D.C. Cir. 1984).

[12] Where's Spanish TV Going?" *Television/Radio Age*, November 23, 1987.

[13] *See e.g.*, Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (Vol. I, Oct. 1980); Competition and Responsibility in Network Television Broadcasting, 25 FCC 2d 318, 333 (1970).

[14] *See generally FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 n.46 (1981).

[15] *See generally Report and Order* in Docket No. 83-1009, 49 FR 31877 (1984) ("Rule of Sevens"); *Report and Order* in BC Docket No. 79-219, 46 FR 13888 (1981) ("Radio Deregulation"); and *Report and Order* in MM Docket No. 83-670, 49 FR 33588 (1984) ("Television Deregulation").

[16] Amendment of Section 73.3555, *Memorandum Opinion and Order*, 100 FCC 2d 74 at 92-94 (1985).

[17] The Commission waives its rules when the public interest is best served by such waiver. "[A] general rule, deemed valid because its overall objectives are in the public interest, may not be in the 'public interest' if extended to an applicant who proposes a new service that will not undermine the policy. . . ." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). We will consider future requests for waiver of the network representation rule on a case-by-case basis.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-594

In the Matter of

Amendment of Section 73.202(b), RM-7250
Table of Allotments,
FM Broadcast Stations.
(Oakdale, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 8, 1990; Released: December 6, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Oakdale Limited Partnership (petitioner), licensee of Station KICR-FM, Oakdale, Louisiana,[1] seeking the substitution of Channel 254C1 for Channel 254C2 at Oakdale[2] and modification of its license to specify operation on the higher powered channel. [3] Petitioner stated its intention to apply for Channel 254C1 if it is ultimately allotted.

2. A staff analysis has determined that Channel 254C1 can be allotted to Oakdale, Louisiana, at the petitioner's suggested site, located 18.6 kilometers (11.5 miles) north of the community,[4] consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. This restriction is required to avoid a short-spacing to Station WIIN(FM), Channel 254C1, Vicksburg, Mississippi.[5] A short-spacing to Station KLAA(FM), Channel 252A, Tioga, Louisiana, will be eliminated following the licensing of that station on 278C2.[6]

3. We believe the public interest would be served by this proposal since it could provide Oakdale, Louisiana, with an expanded coverage FM service. Since petitioner's modification request conforms with the provisions of Section 1.420(g) of the Commission's Rules, we shall propose to modify the facilities of Station KLAA(FM) without entertaining other expressions of interest.

4. Accordingly, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Oakdale, Louisiana	254C2	254C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 28, 1991,** and reply comments on or before **February 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Bruce A. Eisen, Esq.
Kaye, Scholer, Fierman, Hays & Handler
901 - 15th Street, N.W., Suite 1100
Washington, DC 20005

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner is also the licensee of Station KICR(AM), Oakdale.

[2] Petitioner is presently operating on Channel 285A. However, its license was modified to specify operation on Channel 254C2 in MM Docket No. 88-47. *See* 3 FCC Rcd 5815 (1988). Petitioner has been issued a construction permit (File No. BPH-890607IE) for Channel 254C2.

[3] Petitioner filed this proposal in response to a *Notice of Proposed Rule Making* (MM Docket No. 89-447), 4 FCC Rcd 7481 (1989). The *Report and Order* in that proceeding, 5 FCC Rcd 5418 (1990), advised petitioner that its proposal would be the subject of a separate rule making proceeding.

[4] Coordinates at petitioner's suggested site for Channel 254C1 at Oakdale are 30-57-47 and 92-35-02.

[5] Although the proposal is short-spaced to Station WIIN-FM's presently licensed Class C1 facilities, the required separation is met based upon the modified site specified in its construction permit (File No. BMPH-900222IC). Therefore, final action with respect to the Oakdale modification proposal may be postponed until Station WIIN-FM has been issued a license to cover its construction permit.

[6] Station KLAA(FM) (formerly Station KISY(FM)) was moved to Channel 278C2 in MM Docket No. 88-47. *See* 4 FCC Rcd 6242 (1989). Station KLAA(FM) has filed an application for license (File No. BLH-900509KB) to cover its construction permit for Channel 278C2 at Tioga.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-595

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (North East, Pennsylvania, and Olean, New York)	RM-7539

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: November 16, 1990; Released: December 6, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Rambaldo Communications, Inc. (petitioner), requesting the substitution of Channel 265B1 for Channel 265A at North East, Pennsylvania, and the modification of the license of Station WRKT-FM to specify operation on the higher powered channel. To accommodate the allotment at North East, petitioner also requests the substitution of Channel 268A for Channel 265A at Olean, New York, and the modification of Station WMXO's license to specify the alternate Class A channel. Petitioner states that it will apply for Channel 265B1 at North East and also reimburse the licensee of Station WMXO for the reasonable costs associated with the change in channel at Olean.

2. We believe the public interest would be served by proposing the substitution of Channel 265B1 for Channel 265A at North East, Pennsylvania, and the substitution of Channel 268A for Channel 265A at Olean, New York, since it could provide North East with a wide coverage area FM service. Channel 265B1 can be allotted to North East in compliance with the Commission's minimum distance separation requirements, with respect to domestic allotments, with a site restriction of 2.9 kilometers (1.8 miles) east to avoid short-spacings to Stations WZPR, Channel 262B, Meadville, Pennsylvania, and WHOT-FM, Channel 266B, Youngstown, Ohio. The site restriction imposed on Channel 265B1 at North East does not obviate the short-spacing to unoccupied and unapplied-for Channel 266A at Crystal Beach, Ontario, Canada. However, we have confirmed petitioner's showing that Station WRKT-FM can limit its power in the direction of Crystal Beach to avoid prohibited overlap of the Crystal Beach 54 dBu protected contour. Channel 268A can be allotted to Olean, New York, in compliance with the Commission's minimum distance separation requirements and can be used at Station WMXO's licensed transmitter site.[1] Canadian concurrence in the allotments is required since North East and Olean are located within 320 kilometers (200 miles) of the U.S.-Canadian border. We will request Canadian concurrence in the allotment of Channel 265B1 at North East as a specially negotiated allotment.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Olean, New York	239B, 265A	239B, 268A
North East, Pennsylvania	265A	265B1

4. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Erin Communications, Inc., licensee of Station WMXO, Olean, New York, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 268A as proposed herein instead of the present Channel 265A.

5. Pursuant to Section 1.87 of the Commission's Rules, Erin Communications may, not later than **January 28, 1991,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Erin Communications to furnish additional information. If Erin Communications raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Erin Communications will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

6. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensee of Station WMXO, as follows: Erin Communications, Inc., 201 North Union Street, Olean, New York 14760.

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **January 28, 1991,** and reply comments on or before **February 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Joel Bernstein, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036-2679
(Counsel to petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 265B1 at North East are North Latitude 42-12-30 and West Longitude 79-48-00. The coordinates for Channel 268A at Olean are 42-06-24 and 78-23-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-522

In the Matter of

Amendment of Section 73.202(b),	RM-6967
Table of Allotments,	
FM Broadcast Stations.	
(Jackson, Tennessee, and	
Caruthersville, Missouri)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 19, 1990; Released: December 6, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of C R Broadcasting, Inc. (petitioner), licensee of Station WMXX(FM), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 8202 (1989), proposing the substitution of Channel 276C2 for Channel 276A at Jackson, Tennessee, and the modification of Station WMXX(FM)'s license to specify operation on the higher powered channel. In addition, to accommodate the upgrade at Jackson, we proposed the substitution of Channel 286A for Channel 276A at Caruthersville, Missouri, and the modification of the license for Station KLOW(FM) to specify the alternate Class A channel. Petitioner filed supporting comments reaffiriming its intent to modify Station WMXX(FM) to Class C2 facilities. No other comments were received.

2. We believe the public interest would be served by substituting Channel 276C2 for Channel 276A at Jackson, Tennessee, and substituting Channel 286A for Channel 276A at Caruthersville, Missouri, since it would provide Jackson with an expanded coverage area FM service. Pemiscot Broadcasting, Inc., licensee of Station KLOW(FM), has consented to the modification of the station's license to specify Channel 286A. Petitioner has reiterated its intention to reimburse Pemiscot Broadcasting, Inc. for the reasonable costs associated with Station KLOW's channel change. Channel 276C2 can be allotted to Jackson, Tennessee, in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.1 kilometers (8.1 miles) south to accommodate petitioner's desired site. Channel 286A can be allotted to Caruthersville in compliance with the Commission's minimum distance separation requirements and can be used at Station KLOW(FM)'s licensed transmitter site.[1] Further, as proposed, we will modify the license of Station KLOW(FM) to specify operation on Channel 286A, and Station WMXX(FM) to specify operation on Channel 276C2, in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Caruthersville, Missouri	286A
Jackson, Tennessee	268A, 276C2, 281C

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of C R Broadcasting, Inc., for Station WMXX(FM), Channel 276A, Jackson, Tennessee, IS MODIFIED to specify operation on Channel 276C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Pemiscot Broadcasting, Inc, for Station KLOW(FM), Caruthersville, Missouri, IS MODIFIED to specify operation on Channel 286A in lieu of Channel 276A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KLOW(FM)'s license, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-6682, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee, as follows:

Pemiscot Broadcasters, Inc.
P.O. Box 909, Highway 84 West
Caruthersville, Missouri 63830

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 276C2 at Jackson are North Latitude 35-30-00 and West Longitude 88-50-00. The coordinates for Channel 286A at Caruthersville are North Latitude 36-12-50 and West Longitude 89-41-25. Since the Jackson substitution is made as a result of a petition for rule making filed prior to October 2, 1989, C R Broadcasting may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-378

In the Matter of

Amendment of Section 73.202(b), RM-6823
Table of Allotments,
FM Broadcast Stations.
(Leesville, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 8, 1990; Released: December 6, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Stannard Broadcasting Company, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 6657 (1989), proposing the substitution of Channel 289C3 for Channel 288A at Leesville, Louisiana, and the modification of its license for Station KVVP(FM) at Leesville to specify operation on the higher powered channel. Petitioner filed supporting comments reaffirming its interest in modifying Station KVVP(FM) to Class C3 facilities. No other comments were received.

2. We believe the public interest would be served by substituting Channel 289C3 for Channel 288A at Leesville, Louisiana, since it would provide the community with an expanded coverage area FM service. Channel 289C3 can be assigned to Leesville, Louisiana, in compliance with the Commission's minimum distance separation requirements with a site restriction 17.3 kilometers (10.7 miles) south of Leesville.[1] As proposed, we will also modify petitioner's license for station KVVP(FM) to specify operation on Channel 289C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Séctions 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Leesville, Louisiana	224A, 289C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Stannard Broadcasting Company, Inc., for Station KVVP(FM), Leesville, Louisiana, IS MODIFIED to specify operation on Channel 289C3, in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 289C3 at Leesville are North Latitude 30-59-30 and West Longitude 93-13-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 29, 1990

Released: December 7, 1990

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Mel Karmazin, President	8210-AJZ
Sagittarius Broadcasting	C5-223
Corporation,	C11-510
Infinity Broadcasting Corporation	C12-169
of Pennsylvania &	
Infinity Broadcasting Corporation	
of Washington, D.C.	
Licensees, Stations WXRK(FM),	
WYSP(FM) & WJFK(FM)	
600 Madison Avenue, Fourth Floor	
New York, New York 10022	

Dear Mr. Karmazin:

This letter constitutes a NOTICE OF APPARENT LIABILITY for FORFEITURE to Sagittarius Broadcasting Corporation, licensee of Radio Station WXRK(FM), New York, New York, Infinity Broadcasting Corporation of Pennsylvania, licensee of Radio Station WYSP(FM), Philadelphia, Pennsylvania, and Infinity Broadcasting Corporation of Washington, D.C., licensee of Radio Station WJFK(FM), Manassas, Virginia, pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.[1]

On October 26, 1989, we asked for your comments concerning a complaint received by the Commission alleging that portions of the "Howard Stern Show" (transcripts of which are attached) broadcast by WXRK(FM), New York, New York, and simultaneously carried on WYSP(FM), Philadelphia, Pennsylvania, and WJFK(FM), Manassas, Virginia, contained indecent material. The broadcasts at issue occurred between 6 a.m. and 10 a.m. on December 16, 1988. On December 29, 1989, you submitted a response, challenging all of the allegations on various legal and policy grounds. For the reasons discussed herein, we disagree with your arguments and find stations WXRK, WYSP, and WJFK willfully or repeatedly violated 18 U.S.C. § 1464 by airing indecent programming. Your arguments are addressed *seriatim*, under the topic headings below:

1. The Cited Material Violated the Commission's Indecency Standard Because It Was Patently Offensive.

You argue that the Stern excerpts are not "indecent" within the meaning of the Commission's indecency definition, because they are not descriptive of sexual or excretory organs or activities. You claim that the few references to "penis," "wiener," "masturbate" and other sexual references are fleeting and isolated as well as obscure and innocent. You also claim that the references are not "patently offensive," because: 1) the term "patently offensive" is vague; 2) discussions of penis size are not *per se* prohibited; 3) "had" or "been with a man" and "hop in the sack" are no more offensive than scenes in daytime and evening television suggestive of sexual activity; and 4) the humorous context in which the comments were made does not render otherwise unobjectionable remarks "patently offensive." Finally, you assert that written excerpts exaggerate and concentrate the fleeting nature of the references which were extended throughout an entire program.

Section 1464 of Title 18 of the United States Code prohibits utterances of "any obscene, indecent or profane language by means of radio communication." Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464. The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987)("Infinity"). In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court upheld the Commission's authority to regulate indecent broadcasts and rejected the argument that the Commission's definition, essentially unchanged from the one used today, was unconstitutionally vague. Using the same definition of indecency, the United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (" *ACT I* ").

We find that the Stern broadcast fits squarely within the above definition of indecency. Rather than containing merely an occasional fleeting and isolated reference to sexual matters, the excerpts in the attached transcript reflect a dwelling on sexual matters, including sexual intercourse, orgasm, masturbation, lesbianism, homosexuality, breasts, nudity, and male and female genitalia. Detailed "descriptions" of those topics are not prerequisites to an indecency finding. *See, e.g., Letter to Carl J. Wagner (WFBQ (FM) and WNDE (AM), Indianapolis, Indiana)*, dated July 19, 1990 (MMB) at 3-4. Moreover, the Stern show contained frequent and explicit verbal references to sexual activities and organs that were lewd and vulgar and that, when taken in context, were made in a pandering and titillating fashion. And while a humorous context will not necessarily exacerbate the offensiveness of certain remarks, it will also not ameliorate the impact of otherwise patently offensive speech. *See Letter to Michael J. Flaherty (WIOD (AM), Miami, Florida)*, dated October 26, 1989 (MMB) at 2.

2. Comparisons with Prior and Contemporaneous Indecency Rulings Do Not Exonerate WXRK, WYSP and WJFK.

You contend that the Stern excerpts were no worse than other radio programs that the Commission has declined to find actionably indecent. You claim that this "precedent" unquestionably insulates the Stern show from an indecency finding, and that a contrary finding would

result in dissimilar treatment of similarly-situated parties, in violation of *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). Your arguments are unpersuasive. You claim that certain excerpts from programming the Commission has previously determined not to be indecent are similar to the words and topics at issue in the Stern excerpt, as cited in the Bureau's letter of inquiry in this proceeding. Such similarity, however, cannot by itself warrant the conclusion that the Stern passages are also not indecent. As the Commission has already stated, it is not the specific words or particular subject matter, *per se*, which render material indecent; rather, an indecency determination must include review not only of the express language or depiction involved and its topic but a careful consideration of the various factors that comprise the context in which the material was presented. *Infinity Broadcasting of Pennsylvania*, 3 FCC Rcd 930, 931-32 (1987)("Infinity Reconsideration").[2] Because the contexts of the specific excerpts which you claim exonerate your stations vary widely from that of the Stern show, they do not provide a basis for finding the Stern material not indecent. [3] In short, you have not shown, for purposes of an indecency determination, that you are similarly situated to those licensees whose broadcasts the Commission has found not violative of the indecency prohibition. You also have not shown, therefore, that a finding of indecency in your case would be inconsistent with the requirements outlined by the court in *Melody Music, Inc. v. FCC*, *supra*.[4]

Although you argue that licensees must rely exclusively on the Commission's rulings to determine the boundaries of patent offensiveness (which you assert remain unclear), the December 16, 1988, broadcast at issue here occurred before any of the rulings you cite were issued. Therefore, you could not have relied upon any of these rulings in making your determination as to whether the Stern broadcast was indecent. In fact, the most pertinent precedent available at the time of the subject broadcast was the Commission's action against your own station, WYSP, in the 1987 *Infinity* case (as upheld in *ACT I* in 1988) for a broadcast of other Stern program material which was similar in nature to the broadcast at issue here.

3. The Stern Excerpts Were Measured Appropriately By Contemporary Community Standards for the Broadcast Medium.

You argue that the appropriate standard for judging indecency for FM radio is a local one. Given that premise, you attempt to demonstrate through audience ratings that Howard Stern's broad appeal among adult listeners in the New York metropolitan area, and the number of prominent guests featured on his show, demonstrate that the show comports with the standards for the New York metropolitan area. You further argue that even if a national standard is appropriate, it is ill-defined, and that in any event, WXRK would comply because sexually oriented programming is so entrenched in radio and television programming, including talk shows and popular recorded music, that it is presumptively accepted by the average listener or viewer.

The Commission's indecency standard, as articulated in the *Infinity Reconsideration* is measured by "contemporary community standards for the broadcast medium." This standard is not a local one, as it does not encompass any particular geographic area, but rather, is the standard of an average broadcast viewer or listener. *See Infinity Reconsideration*, 3 FCC Rcd at 933. This means that the Commission employs its own expertise in broadcast matters as well as drawing on its knowledge of the average viewer or listener. *Id.* This standard has been an integral part of the Commission's definition of indecency which has been upheld by the Supreme Court in the *Pacifica* case as well as by the Court of Appeals for the District of Columbia Circuit in *ACT I*. 852 F.2d at 1340. In this, as in every case, the Commission's determination of the average listener does not focus on the sensibilities of the complainant, as you suggest, or any single listener.

Further, Howard Stern's sustained popularity among the adult listening population in a particular community does not vitiate the broadcast's violation of federal law. *See Letter to Carl J. Wagner (WFBQ (FM) and WNDE (AM), Indianapolis, Indiana)*, dated July 19, 1990 (MMB) at 3. A program's popularity among adults does not address the Commission's objective of protecting children who may be in the listening audience. *Id.*

That sexually oriented programming may now be "entrenched" in broadcasting does not render the Commission powerless to take action against those stations that broadcast material proscribed by the statute. As already noted, the discussion of certain sexual topics is not *per se* indecent. *Infinity Reconsideration*, *supra*, at 932. Such broadcasts are only inappropriate when presented, as here, in a patently offensive manner during hours when there is a reasonable risk that children may be in the audience.

4. WXRK's Survey Results Purporting to Establish an Absence of Children (Aged 6 to 11) in its Audience Do Not Preclude an Indecency Finding.

You contend that through Gallup survey results, you have determined that virtually no children between the ages of 6 and 11 are present in the WXRK audience between 6 a.m. and 10 a.m. Even accepting these results at face value, they do not preclude a finding that programming aired by your stations during this time period was actionably indecent. The courts have presumed that during the hours at issue here there is a reasonable risk that children may be in the general radio audience. *Pacifica*, *supra*; *ACT I*, *supra*. Furthermore, as the Commission stated recently, "if children in a given market are in the broadcast audience, they may well tune into a particular station when 'grazing' through different channels. . ." *Enforcement of Prohibitions Against Broadcast Indecency in 18 U. S. C. § 1464*, 5 FCC Rcd 5297, 5309 (1990). To adequately demonstrate, therefore, that no reasonable risk of exposing children to indecent material exists, a station would have to show that children are not in the broadcast audience on a market-wide basis. *Id.* Surveys of actual listenership of the Stern show cannot establish that children will not tune in incidentally or come across the material aired by your station. You have not made the requisite market-wide showing[5] and in its absence, the presumptive risk to children from indecent programming aired during the hours here in question remains valid.[6] With respect to your argument that you have implemented specific policies to safeguard against indecent broadcasts, a licensee's good faith conduct is no defense to a statutory violation for purposes of Commission enforcement action, but may affect the sanction imposed. *Infinity Reconsideration*, 3 FCC Rcd at 933. The Commission made it clear by its enforcement actions in 1987 that the kind of material before us here is action-

able, and that licensees will be held responsible for erroneous good-faith judgments which stray this far afield in their indecency determinations. We note that your station, WYSP, was previously issued a warning in the 1987 *Infinity* case concerning indecent material aired on the Howard Stern show, the same program involved here.

In conclusion, it appears that on December 16, 1988, between 6 a.m. and 10 a.m., Stations WXRK, WYSP, and WJFK violated 18 U.S.C. § 1464 by airing indecent programming during daytime hours. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Sagittarius Broadcasting Corporation, Infinity Broadcasting Corporation of Pennsylvania, and Infinity Broadcasting Corporation of Washington, D.C., licensees of stations WXRK, WYSP and WJFK, respectively, are hereby advised of their apparent liability for a forfeiture of two thousand dollars ($2,000) each. The amounts specified were reached after consideration of the factors set forth in Section 503(b)(2) of the Act, including the licensees' asserted good faith conduct.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent. 47 C.F.R. § 1.80(f)(3).

Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

ATTACHMENT

Infinity Broadcasting Corporation
Radio Station WXRK(FM),
New York, New York
The Howard Stern Show
6:00-10:00 a.m.

December 16, 1988

We're back at the Christmas Party . . . and I gotta tell you it's wild in here, Robin . . . the guy who plays the piano with his wiener is here now.

(Gay choir) We got two gay guys and a heavy-set woman lesbian (Negro). Remember you're on the radio, will you honey? I get called a fag hag. Have you ever had a man? Have you been with a man? Disappointment, hell. Oh, you like it? Well, it's not just a preference. It just doesn't turn me on as much . . . you gotta be glad about the 5-minute AIDS test. Now you guys can test each other and then hop into the sack.

What is it that men don't find me attractive? . . . men who find other men attractive . . . my uh? . . . your small penis probably . . .

How about this? "A Tuckis So Bright"?

(Gay choir) - "I'm dreaming of some light torture, some bruises just to make me moan . . . Masturbate. Humiliate. Gay sex is fun in the city. Howard Stern is going to learn how great a tuckis can be . . ."

(To Robin, about to be hypnotized by Dr. Marshall King) Just think about this. Every time I rub my ear, you'll be orgasming.

Vinnie Mazzie, ladies and gentlemen. The man who lit his penis on fire . . . and now feels that he can eat six live crickets . . .

* * *

Here's a guy who plays the piano with his penis. I'll tell you. What a weird crew!

She doesn't give me anything as far as jewelry is concerned. That's because you don't have a penis.

I think it will be worth the whole show just to hear her have an orgasm when I rub my ear.

I understand the doctor (hypnotist) explained that you would not go for that orgasm thing. Like, in other words, that you would not accept it . . . Boy, you must be difficult in bed. He says he'll hypnotize Bo the lesbian . . . and she's a good subject. She's an empty slate.

Bo, you look great. Yes . . . Bo . . . getting very aggressive. Bo just rubbed herself in my face. Juliet (one of the naked girls) getting wild. Oh, my God. Diane (another naked girl) is whipping Bo. Good, girls, excellent. The big black lesbian is out of her mind with lust. Look at her. You can't say it on the air? Were you getting excited? Fabulous. All right. That was really good. Best part of the whole Christmas Party.

I want to rub my ear and have this girl go wild for me . . .When we come back from commercial, we have a young man who wants to play the piano with his, uh, wiener . . . Howard, I'd better go into the other room and, uh, get it ready. I'll come strolling in swinging it. It's bigger than yours. I've got a rubber. Don't worry about it. And I've got a second rubber for encore. He's going to wear a contraceptive. I do safe organisms . . . orgasms. I'm going to play the Casio . . . I believe we hit two keys at the same time. You'd better give me the next segment, though. I'm going to get it going. O.K.? Go in the other room and do whatever you have to do to play it.

The doctor is now hypnotizing Bo and he wants to know exactly what it is you want her to do. The orgasm thing? I want more. I was thinking of something a little heavier like beg me to make love to her. Oh, there's an idea. You have her beg me . . . go wild for me . . . get off

her chair . . . she can't resist me. She'll come and attack you. Right. That's what I want . . . I've never had that. Let's see the Doc do that.

We'll be back right after this with a hypnotized Bo and the guy who plays the piano with his penis . . . It's a *Christmas* Party! . . . More gay Christmas Songs . . . and the burper . . . he's going to be belching for us . . . and, um . . . 'Gina Girl might even be persuaded to do the 'Gina Dance again. Is there a chance you could do the 'Gina Dance? . . .

FOOTNOTES

[1] Sagittarius Broadcasting Corporation, Infinity Broadcasting Corporation of Pennsylvania, and Infinity Broadcasting Corporation of Washington, D.C. are all wholly-owned subsidiaries of Infinity Broadcasting Corporation. Because the WXRK broadcast at issue was simultaneously carried on commonly owned stations WYSP and WJFK, the latter stations are considered concurrently.

[2] *See also FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)(stating that "indecency is largely a function of context -- it cannot be adequately judged in the abstract.") (Opinion of Stevens, J., in which Burger, C.J., and Rehnquist, J., joined).

[3] As a representative example, you cite the Commission's dismissal of an indecency complaint against station KTVI, St. Louis, Missouri, for a broadcast of "Geraldo" entitled "Unlocking the Great Mysteries of Sex." *See Letter to Gerald P. McAtee, (KTVI, St. Louis, Missouri)*, dated October 26, 1989. Although that program involved a frank discussion about sexual technique, unlike the Stern show, it was not presented in a pandering, titillating, vulgar, or otherwise patently offensive manner. *See also King Broadcasting Company*, 5 FCC Rcd 2971 (1990).

[4] Parties whose circumstances, including critical contextual considerations, have been sufficiently similar for purposes of indecency determinations, have been treated similarly. Licensees which have broadcast the same material under similar conditions, for example, have received like dispositions. *See Letter to Michael J. Flaherty, supra, and Letter to Legacy Broadcasting of Detroit, Inc. (WLLZ(FM), Detroit, Michigan)*, released September 29, 1989 (each radio station fined $2000 for indecent daytime broadcasts of a musical recording entitled "Walk with an Erection.")

[5] In fact, your own survey data demonstrate that 35% of the radio households in the New York market included children between the ages and 6 and 11 during the 6 a.m. to 10 a.m. period.

[6] Contrary to your suggestion, the court's dictum in *ACT I* that the Commission invite comments on its channeling policy for both daytime and evening hours did not invalidate the Commission's continuing indecency policy with respect to daytime broadcasts, which the court upheld. Indeed, the court's decision in *ACT I* specifically affirmed the Commission's indecency finding against your station, WYSP, for broadcasts during precisely the time period at issue here and for the same program, the Howard Stern show. That decision also directly contradicts your contention that the Commission is unable to proceed with indecency actions against broadcasts aired during daytime hours until it adopts a new channeling policy for indecent programming. Your assertion that absent a new channeling policy "broadcasters must make decisions at their peril concerning the appropriate times for airing possibly indecent material" is also unconvincing given both the court's affirmance in *ACT I* and the Commission's subsequent decision in *Kansas City Television, Ltd.*, 4 FCC Rcd 6706 (1989). The latter decision unequivocally stated the Commission's intention to continue enforcing the indecency prohibition against, at a minimum, daytime broadcasts.

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen Docket No. 90-314

In the Matter of

Amendment of the Commission's Rules
to Establish New Personal
Communications Services

ORDER EXTENDING TIME
FOR REPLY COMMENTS

Adopted: November 21, 1990; Released: November 23, 1990

By the Office of Engineering and Technology:

1. Digital Spread Spectrum Technologies, Inc. (DSST) and Motorola, Inc. (Motorola) have filed requests for extensions of time asking that the due date for filing reply comments to the *Notice of Inquiry* (*Notice*) in the above-captioned proceeding be extended until January 15, 1991 and January 30, 1991, respectively. GEC Plessey Telecommunications LTD (GPT) has filed a response to DSST's request and PCN America, Inc. (PCN) has filed comments in support of Motorola's request. DSST states that a forty-five day extension will allow time for it to develop fully the technical rationale for an open-entry framework for personal communications services. Further, it states that it expects that other parties could utilize a brief extension to provide more detailed information. Motorola and PCN cite the large number of comments filed as justifying an extension of time for filing reply comments. GPT argues that the technical development process proposed by DSST cannot be completed in the time frame DSST specifies. Accordingly, GPT urges that no extension of time for filing reply comments be granted, but that if an extension is granted, it should be for only two weeks.

2. The Commission does not routinely grant extensions of time. However, due to the large volume of comments that have been filed in response to the *Notice*, we believe that an extension of time is desirable in this instance to afford sufficient time to prepare reply comments. In the interest of expediting this proceeding, and in the belief that a lesser extension will afford all parties adequate time to prepare such comments, we shall grant DSST's request. Accordingly, IT IS ORDERED, that the time allowed for filing reply comments IS EXTENDED to January 15, 1991.

3. This action is taken pursuant to authority found in Section 4(i), 302, and 303 of the Communications Act of 1934, as amended, 47 USC Sections 154(i), 302, and 303, and pursuant to Sections 0.31 and 0.241 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 30, 1990

HAMMETT & EDISON, INC. REQUEST FOR CLARIFICATION CONCERNING TV MULTIPLEXED TRANSMITTERS' AURAL PERFORMANCE

On July 10, 1990, Hammett & Edison, Inc. ("H&E") filed a request with the Commission for clarification of the performance requirements of television broadcast transmitters with respect to the allowable energy around 15.734 kilohertz (kHz) from the aural carrier. The BTSC Multichannel Television Sound (MTS) system utilizes the 15.734 kHz frequency for transmission of a pilot subcarrier to illuminate a receiver stereo light and activate stereo decoder circuitry. While the Commission's rules do not require TV stations to transmit in stereo, or, if they choose stereo operation, to use the BTSC MTS system, the BTSC pilot subcarrier frequency must be "protected" in accordance with Section 73.682(c)(3) of the Rules. Section 73.682(c) has been understood by some parties as being applicable only to stations that multiplex an additional subcarrier signal on the aural carrier, either for stereo operation or for other permitted uses. H&E indicates that it has measured TV broadcast transmitters that multiplex the aural and visual signals and found the aural signal "contaminated" by components of the visual signal. H&E requests that the Commission clarify whether stations that transmit a monophonic sound signal without multiplexed aural subcariers must suppress energy in accordance with Section 73.682(c)(3). On September 24, 1990, Television Technology Corporation, a transmitter manufacturer, submitted a letter stating its belief that Section 73.682(c)(3) applies only to stereophonic transmissions.

Comments on Hammett & Edison's request must be filed on or before January 15, 1991. Replies must be filed on or before February 15, 1991. Comments and reply comments should refer to the following number: MMB 9007101A. Information that would be particularly useful includes the number of multiplex transmitters in use or projected to be in use in the next few years; whether these transmitters can be used for stereo operation; whether spurious signals at or near 15.734 kHz can be easily eliminated; the existence of any viewer complaints regarding the sound from stations employing these transmitters; and other operational problems (such as aural overmodulation) that stations employing multiplex transmitters may have experienced.

The full text of H&E's request and related comments and pleadings, including those filed in response to this Public Notice, are available for viewing and copying in the Public Reference Room, Room 239, 1919 M St., N.W., Washington, D.C. Copies may also be purchased from the Commission's copy contractor, International Transcription Service, at (202) 857-3800.

For further information, contact Gordon Godfrey at (202) 632-9660.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-292

In re Applications of

PLEASURE ISLAND BROADCASTING, INC. File No. BPH-871203M0

PETE WOLFF, III File No. BPH-871203NW

For Construction Permit for a
New FM Station on Channel 298A
in Orange Beach, Alabama

Appearances

Morton L. Berfield, Esq. and *John J. Schauble, Esq.* on behalf of Pleasure Island Broadcasting, Inc.; *Dennis J. Kelly, Esq.*, on behalf of Pete Wolff, III; and *Charles E. Dziedzic, Esq.* and *Robert A. Zauner, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
RICHARD L. SIPPEL

Issued: November 26, 1990; Released: December 7, 1990

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of two parties: Pleasure Island Broadcasting, Inc. ("PIBI") and Pete Wolff III ("Wolff").[1] PIBI and Wolff are competing for the award of a permit to construct a new FM station on Channel 289A at Orange Beach, Alabama. Here, there is no winner because PIBI is declared unqualified to receive a grant in this case and Wolff has failed to show how he will fulfill his proposed integration as sole proprietor.

2. The *Hearing Designation Order* ("HDO") DA 89-671, released June 27, 1989, 4 F.C.C. Rcd 5210, published at 54 Fed. Reg. 28716 (released July 7, 1989) sets the standard comparative issue for adjudication:

> (a) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (b) To determine in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

HDO at Para. 11. The *HDO* also provides for the receipt of evidence on whether based on a comparison of the engineering proposals there would be found a significant difference in the size of the areas and populations which would be served. *See HDO* at Para. 9.

3. A prehearing conference was held on September 28, 1989, at which procedural and trial dates were set. *Order*, FCC 89M-2382, released October 2, 1989. Hearing sessions were held on February 27-28 and April 26, 1990. On the first day of hearing, former applicant Miller, who faced an added financial issue, dismissed voluntarily (Tr. 24). *See Order* FCC 90M-417, released March 2, 1990. The Presiding Judge also announced that he was adding financial issues against former applicant Bodiford which would be tried in a second phase in April 1990. Bodiford withdrew his application on the eve-of-trial. *See Order* FCC 90M-1017, released May 1, 1990.

4. Thus, of the nine original applicants, only PIBI and Wolff stayed for a final decision on the comparative merits of the respective applications. The Presiding Judge closed the record on May 18, 1990, and the parties filed Proposed Findings of Fact and Conclusions of Law on June 15, 1990. The parties thereafter filed Reply Proposed Findings of Fact and Conclusions of Law on July 3, 1990 (Tr. 654-55). *See Order* FCC 90M-985, released April 27, 1990.

5. There are no qualifying issues to consider. This decision will only address the comparative issues in accordance with the Commission's standards at 47 C.F.R. §1.267(b). The burdens of proof on the issues are with the respective parties. This is an administrative proceeding tried under §5 of the Administrative Procedure Act [5 U.S.C. §§551 *et seq.*] and the preponderance of the evidence standard applies. *Steadman* v. *SEC*, 450 U.S. 91 (1981). Testimony is cited where practicable by the name of the witness followed by the transcript page number. References to exhibits are to the numbered exhibits of each applicant that were admitted into evidence at the hearing. References to proposed findings and conclusions are introduced by "PFC."

FINDINGS OF FACT

6. Since the applications are mutually exclusive, a consolidated factual hearing was conducted on all issues wherein the parties presented evidence and conducted cross-examination. *Ashbacker Radio Corp.* v. *F. C. C.*, 325 U.S. 327, 333 (1945); *U. S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956) (parties have right to present oral and documentary evidence and to conduct cross-examination).

Comparative Coverage

7. The parties were required to submit comparative coverage evidence in order to permit consideration of the areas and populations within the respective Grade B contours and the availability of other primary aural services of Grade B or greater intensity. The findings are based on Joint Engineering Exhibits 1 and 2 that were received in evidence on February 26, 1990. (Tr. 27-29.)

8. There are at least five full-time aural services providing service to all areas within the 60 dBu contours of the PIBI and Wolff applications herein. (Joint Exh. 1, p. 1.) PIBI's 60 dBu contour will encompass 22,624 people in an area of 711.7 square kilometers. Wolff's 60 dBu contour will encompass 25,854 people in an area of 711.7 square kilometers. (Joint Engineering Exh. 1, p. 2.)

Media Diversification

9. Neither PIBI nor any of its shareholders have any interest in any medium of mass communications. (PIBI Exhs. 1, 2, 3, 4.)

10. Wolff, an individual applicant here, is the sole owner of Wolff Broadcasting Corporation ("WBC") which is the licensee of Co-Stations WIJK(AM) and WIJK-FM at Evergreen, Alabama. (Wolff Exh. 1 at 1.) Evergreen is approximately 105 miles distant from Orange Beach. (Wolff, Tr. 626.)

11. Wolff made no divestiture commitment in his application as originally filed on December 3, 1987. (Bodiford Exh. 5 and Wolff, Tr. 606-07.) Wolff stated that the reason for not making an initial divestment pledge was because he wanted first to see if there would be filed any competing applications. (Wolff, Tr. 604.) Later, in an amendment filed on February 29, 1989, before the "B" cut-off date, Wolff disclosed his commitment to divest all his interest in the Evergreen stations in the event that he is granted a permit for Orange Beach. (Wolff Exh. 1 at 1 and Bodiford Exh. 6.)

12. At the time that Wolff made his divestiture commitment, the Evergreen FM facility was a Class A station that served Conecuh County. (Wolff, Tr. 606-607.) The amendment made reference to a Rule Making proceeding in which was proposed an upgrade to a Class C2 station. (Bodiford Exh. 6 at 2.) And on January 13, 1989, the FM table of allocations was changed to upgrade the FM station to Class C2. (Bodiford Exh. 7 at 4.) WBC received a construction permit to build the Class C2 facilities on May 12, 1989. (*Id.*) Wolff did not report the information in this proceeding until July 19, 1989. (Bodiford Exh. 7 at 3.) The amendment filed on that date did not contain a divestiture commitment for the Class C2 station. (Bodiford Exh. 7.)

13. The population of Conecuh County, which is the county the Class A station served, is 15,884 people. (Wolff, Tr. 647-648.) The Class C2 station serves an area from Montgomery, Alabama to the Alabama shoreline under ideal conditions. (Wolff, Tr. 619.) Wolff had testified at his deposition that the station would cover close to one million people under ideal conditions. (Wolff, Tr. 616.) Wolff testified at hearing that from five hundred thousand to one million people would listen to his station over a thirty day period. (Wolff, Tr. 620.) The FM station has had an advertising agency client in Montgomery and advertisers from the Orange Beach area. (Wolff, Tr. 648.)

STANDARD COMPARATIVE ISSUE

Pleasure Island Broadcasting, Inc.

14. PIBI is an Alabama corporation. Its articles of incorporation were filed with that state on November 20, 1987. PIBI's stockholders, directors and officers are as follows:

Stockholder	Number of SharesOwned	Percentage of Ownership	Corporate Offices
Michael J. Pollock	1,000	33-1/3%	President and Director
James H. Garrison	1,000	33-1/3%	Secretary and Director
Elizabeth B. Sanders	1,000	33-1/3%	Treasurer and Director

(PIBI Exh. 1.)

15. Pollock was a principal in applications for FM facilities in Texarkana, Texas and in Breaux Bridge, Louisana, and he once petitioned the Commission to allocate an FM station to Lake Lorraine, Florida. Therefore, he is found to have experience in the FM broadcast application process. (Pollack, Tr. 80-88.)

16. It was Pollack's idea to file for the Orange Beach allocation in the Summer of 1986. In the interest of forming a group for the venture, Pollack spoke to a high school classmate who was a Florida real estate developer about the Commission comparative criteria. That person recommended Garrison and Sanders. Pollack then personally solicited Garrison and Sanders for the project, both of whom were real estate developers in the Orange Beach area. (Pollack, Tr. 90-94.)

17. Pollack was the promoter of the PIBI venture. He is a certified public accountant. He does not reside in the Orange Beach service area and he has no claim for civic involvement in local matters. He would terminate all activities as an accountant, and any other activity that might interfere with running the station, and he will move to Orange Beach as a local resident if the grant is awarded to PIBI. (PIBI Exh. 2 at 1.)

18. For personal broadcast experience, Pollack relies on the time that he spent with his father in 1960-1963, when his father established Station KXKW in Lafayette, Louisana. Although not an architect, he assisted in designing plans for studio and office space. He also prepared logs and billing invoices, performed miscellaneous office tasks, kept statistics, and made color commentary for sporting events while working at the station after school and during summer vacations. (PIBI Exh. 2 at 2.) However, there is no evidence of Pollack having more recent broadcast experience.

19. Pollack will work at the station at least forty hours per week as general manager. He will be responsible for construction, overall operations, overall supervision of persons and finances and he will assume direct responsibility for the station's EEO program. (PIBI Exh. 2 at 2.)

20. Garrison will work at least forty hours per week as the station's sales manager. In that capacity, Garrison will supervise the sales staff, develop policies directed at sales and commercial promotions, and he will participate in undefined community drives that will assist local community projects. (PIBI Exh. 2 at 1.)

21. Garrison brings local contact to the venture. He has lived within the proposed service area since 1979. (PIBI Exh. 3 at 1-2; Garrison, Tr. 196.) Except for a one year period, he has resided continuously since 1979 in the applicant's city-grade contour. (PIBI Exh. 5; Garrison, Tr.

197.) Garrison has been active in fundraising events for local groups such as the Boy Scouts of America and children in need of special surgery. (PIBI Exh. 3 at 2.)

22. Elizabeth Sanders also will work full-time as program director with duties that will include developing the station's format, developing community and public affairs programming, and supervising the station's programming personnel. (PIBI Exh. 4 at 1-2.) Currently, Ms. Sanders manages an amusement park. She has an interest in entertainment and she has worked in undefined capacities with community leaders. (PIBI Exh. 4 at 1; Sanders, Tr. 526.) Sanders also has made financial commitments to the venture by loaning PIBI approximately $10,000 and by agreeing to make an additional loan of $20,000. (Sanders, Tr. 555.)

23. Sanders has resided within PIBI's service area for the past seven years during which time she has participated in various civic and community activities. She belonged to the Junior Woman's Club of Gulf Shores (three years) with service on several committees donating clothes to needy children and working with local school projects. She served with the Gulf Shores Sports Association (three years) where she organized initial registration of participants in youth sports programs and coordinated the operation of a concession stand at games. She was with the Parent-Teachers Association (PTA) in Gulf Shores (seven years) where she served one year as president when the PTA donated $10,000 worth of equipment to the school. Also, during the time she was president, the PTA initiated an art and music program at Gulf Shores school and raised $50,000 for building a middle school gymnasium.

24. Sanders also served as a room mother for six years and assisted with the yearbook staff. She was involved in drug education programs. She chaired the physical education committee which raised over $20,000 for playground equipment for the school. She served with the Gulf Shores Dolphin Track Club and she was a board member for two years and active in fundraising. She was engaged in other support activities for the club, which trains youth and funds their participation for the National Junior Olympics. She was with the Scholars Bowl to help organize participation by gifted students from South Baldwin county, Alabama in an academic competition in Mobile, Alabama. She served on the Governor's Council on Drug Abuse which took area students to a three day conference in Birmingham, Alabama. She participated in the Cancer Society and Children's and Women's Hospital fund raising in conjunction with use of her Water World amusement park. She worked in the Boy Scouts where she helped in a variety of ways, including a Boy Scouts Expo in Mobile Alabama. She was active in the United Methodist Church in Gulf Shores for six years, during which time she taught Sunday School, served as a member of the administrative board, helped with a children's choir program, worked with youth groups, and chaired a youth advisory council. She worked with the South Baldwin Theatre for three years, and assisted with various productions. She was a member of the Alabama Gulf Coast Area Chamber of Commerce (five years) and the Middle Baldwin County Chamber of Commerce (one year). (PIBI Exh. 4, Pp. 2-3.)

PIBI Credibility Findings

25. Wolff asserts that Elizabeth Sanders' testimony regarding her husband's involvement in PIBI was evasive and untruthful and that George Sanders, her husband, is the real party-in-interest. (Wolff PFC at 9.)[2] Wolff's references to the record will be analyzed *seriatim*.

George Sanders and the Meeting of November 21, 1987

26. Wolff contends that George Sanders was not at the November 21, 1987 initial stockholders' meeting. The record relied on by Wolff reflects Sanders' testimony that the meeting was held in Harold Garrison's office (which was in the same building as George Sanders' office), that Michael Pollack and Harold Garrison were present, and that George Sanders was not present. (Sanders, Tr. 515.) When Pollack was asked about whether George Sanders was at the meeting, Pollack said he may have been but he did not recall. (Pollack, Tr. 125.) There is nothing conclusive about this evidence or in the demeanor of the witnesses that would support a finding that Ms. Sanders was evasive in her testimony.

First Meeting of Michael Pollack and George Sanders

27. Wolff contends that Ms. Sanders was impeached by her testimony concerning the first meeting between Michael Pollack and George Sanders. When asked in her deposition of November 28, 1989, when it came to be that Michael Pollack had become friendly with her husband George, Ms. Sanders said: "Just through being in Gulf Shores on vacation I would imagine, I don't know." In her testimony of February 28, 1990, Ms. Sanders testified that she recalled that deposition testimony. When asked if George Sanders had previously met Pollack before she first met with Pollack, she answered in the affirmative. (Sanders, Tr. 523.) Later, she testified that her husband George was the first person to speak to her about a possible application for Orange Beach. (Sanders, Tr. 524.) From this evidence, it is established that George Sanders first learned about the Orange Beach allocation from Pollack and that it was George Sanders who had first brought the opportunity to his wife's attention. But there is nothing evasive about this testimony.

George Sanders had No Time for Involvement

28. Ms. Sanders testified that when the subject first came up between her and her husband George, he said that the opportunity had been brought to him [George Sanders] but that he did not have the time to get involved and that he was not interested. (Sanders, Tr. 524-25.) There is nothing evasive about Ms. Sanders' testimony even though opposing counsel asked the questions in a probing manner. (*Id.*)

Ms. Sanders' Denial that George Sanders Attended Most of the Meetings and Her Evasiveness about His Involvement

29. But Ms. Sanders' testimony was shaky in failing to recall her husband's attendance and role at various meetings. (Sanders, Tr. 527-35.) She could not recall whether it was at a first meeting or over several meetings that her one-third equity interest was resolved. (Tr. 527-28.) There were several meetings held: some in Garrison's office, some in Sanders' home, some in restaurants, and some at Water World where Ms. Sanders was employed. (Tr. 528.) At the first meeting, George Sanders introduced his wife

to Garrison and Pollack. But Ms. Sanders could not recall whether he stayed for the entire meeting. (Tr. 529.) And if he was present for the meeting, after making the introduction he was silent. (Tr. 530.) Her testimony on the subject concluded that her husband George was "just physically present" for meetings and although he may have attended all of the meetings, it was only as an observer and not as a participant. For an example of some shaky testimony on the subject:

> Ms. Sanders: If we were in my house, I'm sure he may or may not have come through the house, through the room (*sic*), hello. He was not a participant of the meetings.
>
> * * *
>
> Mr. Crispin: So it's your understanding that prior to your first meeting with Mr. Pollack, that there had been several meetings between Mr. Garrison, your husband and Mr. Pollack?
>
> Ms. Sanders: Maybe.

(Sanders, Tr. 531.) The rational inference to draw is that her husband George may have been active in the earlier meetings with Garrison and Pollack that she did not attend and that he was more active at those meetings as to which she has no recollection. That inference could only be rebutted by George Sanders' testimony but PIBI never proferred him for cross-examination.

30. Pollack was looking for local participants when he first made contact with George Sanders. (Pollack, Tr. 102.) Then Pollack drove from Pensocola to Orange Beach and met with George Sanders and Garrison in an office which could have been Garrison's office or which could have been George Sanders' office. (Pollack, Tr. 96-97, 168.) Between the Summer of 1986, and December 1987, there were approximately six face-to-face meetings that involved Pollack, Garrison, George Sanders and Elizabeth Sanders. (Pollack, Tr. 106.) Out of these meetings, a deal was reached whereby Pollack, Garrison and Ms. Sanders would each subscribe for $1,000 in capital and each would loan the venture $20,000, with Garrison and Ms. Sanders lending the first $40,000 after which Pollack would make his $20,000 loan. (Pollack, Tr. 109-10.) And Pollack was clear in his testimony that George Sanders had made his own input into the arrangement. (Pollack, Tr. 117.) Pollack stated:

> I explained [this deal] to him [George Sanders] at the start -- you know the final decision was made with Harold and Beth. But George was explained the deals because he was in the first meeting. He was in most of the meetings. He's been interested in it.

(Pollack, Tr. 111-12). Elizabeth Sanders was unaware of the provisions of this oral arrangement relating to the timing of the loans. (Sanders, Tr. 551-52.) In practice, she put up her money based on Garrison's instruction (Sanders, Tr. 556) and no deal was made as to funding beyond $60,000. (Sanders, Tr. 554.)

31. Pollack clearly was the promoter who sold Garrison and George Sanders on the deal's structure and on Ms. Sander's participation:

> [w]hen I described the application process, and explained that I wanted to have local involvement in my application, and explained the criteria, George said--You want to talk to my wife. She's the one that you ought to have in this application. And that's what we did.

(Pollack, Tr. 103.) Garrison confirmed that Ms. Sanders' gender "didn't hurt anything" (Tr. 178), and that despite not having been in business with Garrison before, "[w]e was [sic] in a tight binge, and she wanted in and was in. I really can't answer why." (Tr. 179). While Pollack testified that George Sanders was aware of decisions as they were being made, Pollack did testify that ultimately the business decision was Ms. Sanders':

> The decision - - - [was] a business recommendation that I made to them, to Beth and Harold [Garrison], and they agreed.

(Pollack, Tr. 112.) Pollack's testimony is neutral as to establishing whether or not George Sanders controlled or influenced Elizabeth Sanders after the application of PIBI was signed and filed. As indicated above, Pollack has established in his testimony that George Sanders was instrumental in setting the structure and financial commitments before his wife Elizabeth was asked to participate and before she was even aware of the venture. Pollack also testified in a manner much more direct than Ms. Sanders and he was clear in his recollection that George Sanders was interested in the venture. The absence of testimony from George Sanders and the failure of PIBI to present his account of his participation and then tender him for cross-examination results in an adverse inference against PIBI and a conclusion that George Sanders was substantially involved in the venture.

Impeachment on Lack of Knowledge of Treasurer's Duties

32. In her cross-examination testimony of February 28, 1990, Ms. Sanders was asked a series of questions by counsel for a former party about her knowledge of her duties as PIBI's corporate secretary:

> Q: - - - these [documents] are excerpts from the By-Laws of your company [which] describe the role of Treasurer of the corporation, correct?
>
> A: Yes, sir.
>
> Q: And its a true statement, Mrs. Sanders, that as of November 28, 1989, you did not know what your responsibilities were as the Treasurer of this corporation?
>
> A: No.
>
> Q: That was an untrue statement?
>
> A: Yes.

Q: I'm going to read - - - as an admission - - - Mrs. Sanders' deposition testimony of November 28, 1989:

"Question: What is your understanding of the duties of the Treasurer - - -?"

"Answer : I don't know. A lot of times you pick out a position in the corporation. If there are three of you and one of you is this and one of you is that and I'm the treasurer."[3]

Q: Okay, now Mrs. Sanders, looking at the document that is the initial minutes of Pleasure Island - - - and you were authorized to open a checking account for the corporation, is that correct?

A: Yes, sir.

Q: Now, Mrs. Sanders you did not do that, correct, you did not open a checking account?

A: No.

Q: Mr. Garrison did, correct?

A: Yes, sir - - a matter of convenience.

Q: [And] in your deposition you did not know where your checking account was located.

A: I was confused on it.

(Sanders, Tr. 536-38.)

33. The testimony continues on the same subject and concludes that in her deposition she was confused about questions asked of her about two checking accounts. The record establishes that a PIBI corporate checking account was opened in November 1987. But Ms. Sanders did not sign a bank signature card until shortly before her deposition two years later. Garrison was the person authorized to sign PIBI checks at least until November 1989, and the practice was for Ms. Sanders and Mr. Pollack to write personal checks for one-third the payment of an expense. Mr. Garrison would deposit those two pro-rated checks, along with his own pro-rated check, into PIBI's checking account and then he (Garrison) would issue the PIBI check. (Sanders, Tr. 539-47.) While Ms. Sanders claims that she was confused by the integration process at her deposition, there is no evidence of record to establish that she did not understand deposition questions and cross-examination questions as they were being framed by counsel. Certainly there is nothing so confusing about these subjects to a business woman of Ms. Sanders' experience and background to hinder clear answers about her "role" as PIBI corporate treasure. She became "confused" as a tactical ploy as the facts established that she was not acting in the capacity of treasurer.[4] Clearly, it was Garrison who handled the treasurer's chores, even after PIBI filed its Form 301 which stated that Ms. Sanders held the position of treasurer. And Ms. Sanders became, with an assist from her counsel, engaged in quibbles about ground rules for answering questions in an apparent effort to deflect counsel's cross-examination questions. (*See e.g.* Tr. 547-49.) Thus, Ms. Sanders will receive no integration credit because her testimonial accounting of her duties as treasurer were not candidly disclosed to the fact-finder in open court and, as a finding of fact, Ms. Sanders did not exercise the office of treasurer between December 3, 1987 (Form 301) and November 28, 1989 (Sanders' deposition), a period of time two years past the organizational stage of the PIBI venture.

Ms. Sanders' Impeachment by her Lack of Knowledge About Pollack

34. Ms. Sanders testified that she was satisfied with information that Garrison had provided her that Pollack was an experienced broadcaster. (Sanders, Tr. 562.) She could not recall on cross-examination whether she was given information on "exactly what broadcast experience." But since Garrison was satisfied, Ms. Sanders was satisfied. (*Id.*) She did not know at her deposition that Pollack was a CPA but she did know that fact on cross-examination. (Sanders, Tr. 563.) Ms. Sanders was a passive participant as evidenced by the steps she took (and failed to take) in learning about Pollack. Here she relied on Garrison. Such evidence on her failure to inquire and her reliance on Garrison, shows her to be a passive participant.

Ms. Sanders' Limited Role in PIBI

35. Ms. Sanders also relied on Garrison for the venture's financing. Garrison obtained a bank letter from the First National Bank of Aliceville. (Garrison, Tr. 194-95.) When asked directly about Ms. Sanders' role, Garrison said:

"I don't know what she had done."

(Garrison, Tr. 186.) When asked about programming, Ms. Sanders could not articulate an entertainment format. (Sanders, Tr. 578.) Pollack, George Sanders and Garrison were the architects of an agreement for each principal to loan PIBI $20,000, with Garrison and Sanders to precede Pollack. Elizabeth Sanders was unclear about the existence of the agreement. (Sanders, Tr. 551-52.) And as indicated in findings above (Paras. 32 to 33), Ms. Sanders did not carry out any duties as treasurer although she was held out to the Commission as the person who would represent PIBI in that corporate position. Even the site was arranged for and a bank letter was obtained by Garrison. (Garrison, 187, 194.) It is found as a fact that Ms. Sanders did not play any significant role in the formation of PIBI's proposal or in the prosecution of PIBI's application, and her passive participation as nominal treasurer was for the purpose of obtaining a gender preference.

Pete Wolff, III

36. Wolff is an individual applicant and would operate the station as a sole proprietor. (Wolff Exh. 1 at 1.) The findings as to Wolff's diversification are incorporated here. (Paras. 10 to 12.)

37. Wolff proposes to work 40 hours per week on a daily basis. As general manager, Wolff would be in charge of all operations, including programming, sales, and technical operations. He also would make all financial arrangements needed to operate and he would hire and fire the personnel. (Wolff Exh. 1 at 1.) Wolff plans to obtain assistance from an unidentified station manager, who is

general manager of the Evergreen stations, who was not called to testify by Wolff, but who would report to Wolff. (Wolff, Tr. 626 and PFC at 14-15.)

38. Wolff now owns two ongoing businesses in Evergreen, Alabama: WIJR AM/FM [formerly WEGN] and a car dealership doing business as Wolff Motor Company. Evergreen is about 105 miles from Orange Beach. (Wolff Exh. 1 at 2). Findings on divestiture of the broadcast facility are made above (Paras. 10 to 12.)

39. The car dealership has been operated by Wolff since 1968. (Wolff, Tr. 597.) Wolff works at the dealership about 35 hours per week. (Wolff, Tr. 600.) Wolff proposes to reduce his weekly time at the dealership to 15 hours to accommodate his integration proposal and he has no other commitments on his time. (Wolff exh. 1 at 2.) Wolff testified that it takes 2 hours and 15 minutes to drive the mileage between Evergreen and Orange Beach. (Wolff, Tr. 627.) While committed to at least a 40 hour week in Orange Beach, Wolff testified that he expects to work fifty to sixty hours at the station. (Wolff, Tr. 625.)

40. As for local residences,[5] Wolff has spent some weekends in a duplex house he owns in Gulf Shores, a community within Wolff's signal coverage. (Wolff Exh. 1 at 2: Wolff, Tr. 640-641.) Wolff does not consider himself to be a resident of Gulf Shores. (Wolff, Tr. 641.) Wolff pledges to move to Orange Beach. (Wolff Exh. 1 at 3.)

41. Wolff has owned WIJK AM/FM since December, 1986. (Wolff Exh. 1 at 3.) He purchased the facility through a judicial proceeding resulting from a repossession. (Wolff, Tr. 599.) Since December, 1986, Wolff has spent at least 20 hours per week overseeing the stations' operations. Wolff is at the station five hours each week and maintains his main business office at the car dealership. (Wolff, Tr. 600.)

42. When Wolff acquired WIJK-FM, it was a Class A facility. The station covered only Conecuh County, Alabama (Tr. 607), an area with a 1980 Census population of 15,884 persons. (Wolff, Tr. 647-48.) Wolff successfully prosecuted a counter-proposal (File No. RM-5763, MM Docket No. 87-451) which led to the allocation of Channel 227C2 in place of Channel 228A at Evergreen. This enabled WIJK-FM to increase its facilities from effective radiated power of 3.0 kW to 50.0 kW, and an increase in antenna height above average terrain. Wolff oversaw the construction of WIJK-FM's Class C2 facilities, which commenced operations in the summer of 1989. (Wolff Exh. 1 at 3.) This experience is meritorious for a broadcast experience credit. However, Wolff never worked full time at the stations where he has spent only five hours per week on the average. (Wolff, Tr. 600, 625.) Thus, his broadcast experience will be assessed as a limited one.

Auxiliary Power

43. PIBI will use auxiliary power for its transmitter and studios to assure continuous operation. (PIBI Exh. 1 at 2.)

44. Wolff also proposes to install auxiliary power generation equipment at his transmitter and studio locations to ensure continued operation of his proposed station in the event of commercial utility power failure. (Wolff Exh. 2.)

CONCLUSIONS OF LAW

45. Section 307(b) of the Communications Act of 1934, as amended, (the Act) requires the "fair, efficient and equitable distribution" of broadcast service. Therefore, an assessment of the evidence must be made under the applicable Commission standard in determining which applicants meet the statutory standard. *See Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965).

46. The primary concerns under the Act are: (1) maximum diffusion of control of the media of mass communications, or diversification, and (2) best practicable service to the public. *West Michigan Broadcasting Co.* v. *F. C. C.*, 735 F.2d 601, 603-607 (D.C. Cir. 1984) (process of comparative evaluation). Thus, comparative credit will be awarded to basically qualified applicants which are without other media interests. The "best practicable service" standard includes the integration of ownership into management which may be enhanced by local residence, civic activities, broadcast experience and, if applicable, minority and female gender preferences. *Id.* There are no specified basic qualifying issues to consider. But the *bona fides* of integration proposals have been challenged and will be considered. *See e.g. N. E. O. Broadcasting Company*, 103 F.C.C. 2d 1031, 1035 (Review Bd 1986) (non- owner spouse found to control 100% of proposed owner in all decisions and therefore applicant not credited with integration). Also, there is a diversification issue to consider.

Comparative Coverage

47. The highest comparative coverage preference generally is awarded to the applicant proposing to provide a first or second service. *Christian Broadcasting of the Midlands, Inc.*, 99 F.C.C. 2d 578, 582-83 (Review Bd 1984). But in this case, none of the applicants will provide service to any underserved areas. And when areas and populations are well-served, only a slight preference will be awarded to applicants proposing substantially greater overall coverage. *See Simon Geller*, 90 F.C.C. 2d 268-269, 276 (Comm'n 1982) (slight preference awarded for coverage superiority of four times more area and 315,000 persons). An applicant would receive the lesser qualitative credit of "very slight preference" for a coverage difference of 27%. *See Barton Broadcasting Co.*, 104 F.C.C. 2d 785, 791 (Review Bd 1986). Where the differences are insignificant, no preference is awarded. *Susan S. Mulkey*, 4 F.C.C. Rcd 5520, 5521 (Comm'n 1989) (coverage difference of 2% for 36,200 persons).

48. On the evidence presented by the parties in their joint engineering exhibit (Para. 7), there was no difference found in the area that each of the applicants propose to cover and the populations differ only by about 3,000 persons (Para. 8). Therefore, neither PIBI nor Wolff is entitled to a preference under comparative coverage.

Diversification

49. Maximum diffusion of control of the media of mass communication is a factor of primary significance in the comparative adjudicative process. *See Policy Statement, supra.*

50. Since neither PIBI nor any of its stockholders have any media interests, PIBI cannot be considered for a diversification demerit. PIBI concedes that Wolff made a timely commitment to divest Station WIJK-FM when it was a Class A facility.[6] (*See* PIBI's PFC at 13.) On Feb-

ruary 24, 1988, by the "B" cutoff. Wolff amended his application and committed to divest all interest in Stations WEGN(AM) and WEGN-FM [later WIJK and WIJK-FM] at Evergreen, Alabama. (Bodiford Exh 6 and Wolff Exh. 1.) Wolff's commitment to divest was made timely and so there is no diversification demerit to be assessed. *See Julia S. Zozaya, et al.*, 5 F.C.C. Rcd , Comm'n *Slip Op.* FCC 90-355, released November 8, 1990, at Para. 11 (divestment pledge must be made by "B" cutoff to avoid a diversification demerit). In the same amendment Wolff specifically disclosed:

> It is Wolff's intention to take all steps to effectuate [WIJK-FM's] modification to a full facility on a C2 channel.

(Bodiford Exh. 6.) Thus, there was no attempt by Wolff to hide his hand with vague or incomplete disclosures. Rather, Wolff's disclosure instructed the Commission and the interested public as to what would be sought and Wolff has followed through on his commitment to up-grade.

51. PIBI argues that even with full disclosure, Wolff's divestiture promise for a Class A facility cannot be applied to Wolff's now up-graded facility, even though it is one and the same station. PIBI also argues that after the C2 up-grade was obtained, Wolff should have disclosed a divestment pledge in a 30 day amendment. (*See* PIBI's PFC at 13-15.) In *Santee Cooper Broadcasting Co.*, 99 F.C.C. 2d 781, 794-96 (Rev Bd 1984), *aff'd sub nom. Women's Broadcasting Coalition, Inc.*, 59 Radio Reg. 2d (P&F) 730, 734 (Comm'n 1986), the Review Board followed the general rubric that a post "B" cut-off acquisition, accompanied by a contemporaneous pledge to divest, will not be counted against the applicant. 99 F.C.C. 2d at 794. In that case, the Review Board accepted an after-the-fact non-contemporaneous pledge to divest stock subscriptions, holding that existing doubts about the cognizability of stock subscriptions justified accepting such a commitment. *Id.* at 795. The Commission approved the Review Board's rationale in that regard, holding that:

> We agree with the Board that the divestiture should be given effect. In our view, it is significant that the parties timely reported the execution of the subscriptions to the Commission in accordance with our rules [§1.65] and simultaneously reported the divestiture.

59 Radio Reg. 2d (P&F) at 734. But that ruling was not made under the same factual setting as Wolff's situation. Wolff did not acquire a new facility after the "B" cut-off. He merely up-graded his FM facility, as he had earlier disclosed he would, and that same FM facility was already subject to a pre-"B" cut-off divestment pledge. Certainly Wolff's situation is appropriate for the application of the logic of the *Santee* holding. Furthermore, given his divestment pledge of February 24, 1988, Wolff could not argue with credibility after receiving a grant that he had not really intended to divest his Class C-2 facility.

52. There also is related precedent that supports Wolff's position. In *Southern Kerwick, Inc.*, 34 F.C.C. 2d 624, 627 (Comm'n 1972), the Commission held:

> [E]xcept for a change in transmitting equipment, a change in site, and a change in frequency, WGNB *remains the same station as that presently authorized.* . . . A change in frequency simply modifies an existing license and does not leave a separate license which can be assigned. We hold that the application for authority to operate on Channel 203 is one for a major change and not for a new station.

Id. (Emphasis added.) In the case here of up-grading WIJK-FM from Class A to Class C2, there was only a "major change" involved and not the acquisition of a new broadcast facility which would require a contemporaneous post "B" cut-off divestment pledge. Here, Wolff properly relied on his divestment pledge made by amendment on February 24, 1988. Therefore, Wolff will not be charged with any diversification demerit.

Standard Comparative Issue

PLEASURE ISLAND BROADCASTING CO.

53. PIBI will receive no credit for its integration proposal because it is unrealistic in view of Elizabeth Sanders' failure to carry out significant responsibilities as the applicant's corporate treasurer, her misrepresentation to the Commission in Form 301 that she was the *bona fide* treasurer, the failure of PIBI to rebut an inference of George Sanders' control, and Ms. Sanders' lack of candor while testifying before the presiding officer. *See Signal Ministries, Inc.*, 104 F.C.C. 2d 1481, 1494 (Review Bd 1986) (an unrealistic organizational structure may be evaluated in terms of denial of integration credit). *See also RKO General, Inc.* v. *F. C. C.*, 670 F.2d 215, 235 (D.C. Cir. 1981) (Commission may find lack of candor where it is evident even though no candor issue is specified), and *Rebecca L. Boedker*, 5 F.C.C. Rcd 2855, 2859-60 (Review Bd 1990).

54. There is substantial evidence which shows that Pollack was the promoter who sought out local residents as co-venturers in order to receive optimal comparative consideration. (Paras. 16-17; 30-31.) Elizabeth Sanders was contacted as an afterthought because her husband George allegedly was not interested, although no corroborative evidence from George Sanders was introduced and Pollack testified that George Sanders was interested. (Para. 30.) And Pollack, Garrison and George Sanders recognized that through a female co-venturer, PIBI would gain a gender preference. (Para. 31.)

55. PIBI has not shown by a preponderance of the evidence that Elizabeth Sanders participated actively as an organizer or as treasurer of the corporate applicant before or after filing. Nor has PIBI met its burden to prove that George Sanders did not exercise influence or control over PIBI while he was attending the several meetings. *Cuban -American, Ltd.*, 5 F.C.C. Rcd 3781, 3785 (Comm'n 1990) (applicants have the burden of proof to establish how they will effectuate integration proposals). *See Telestar, Inc.*, 2 F.C.C. Rcd 7352, 7353 (Comm'n 1987) (burden is on applicant to prove qualifications by preponderance of evidence). *See also Canon's Point Broadcasting Co.*, 93 F.C.C 2d 654, 655 (Review Bd 1983) (Commission examines spousal relationships where there are close business ties and the independence of a family member is seriously called into question).

56. As the nominal treasurer, Ms. Sanders did nothing. Her duties as treasurer were exercised by Garrison. (Paras. 32 to 33.) She could not even recall whether there was a written loan agreement that would bind her in the sum of $20,000.00. (Para. 35.) And even though she was proferred as PIBI's program director, she could not articulate, even in general terms, the programming that was contemplated. (Para. 35.) Although she was afforded ample opportunity to demonstrate on-the-record some meaningful input or participation, the only supporting trial evidence was her affirmative response to her counsel's leading and conclusory question on re-direct examination:

> Q. Now, Mrs. Sanders, I wonder, did you play any role in either gathering information or helping to organize the Pleasure Island application?
>
> A. I played many roles in organizing the application.

(Sanders, Tr. 573.) But her co-venturer, Garrison, stated flatly that he "didn't know what she had done." (Para. 35.) Under the facts of this record, it would be an unrealistic fiction to give credit to a structure that envisions participation in management by Elizabeth Sanders. *See Doylan Forney*, 5 F.C.C. Rcd 5423, 5426 (Comm'n 1990) (PIBI has the burden of showing the extent of Ms. Sanders' policy function and proposed role in management). Also, in view of the fact that she failed to carry through on her duties as treasurer, and in light of her testimony that her designation as treasurer was *pro forma* (Para. 32), the representations in Form 301, in an integration statement, in sworn written testimony, and in cross-examination that Elizabeth Sanders was the *bona fide* treasurer of PIBI was an intentional misrepresentation to the Commission that disqualifies PIBI from receiving a grant in this proceeding. *See Rebecca L. Boedker*, *supra*, and *Old Time Religion Hour, Inc.*, 95 F.C.C. 2d 713, 719-23 (Review Bd 1983), *recon. denied*, 96 F.C.C. 2d 551 (Review Bd 1985), *rev. denied*, 57 Radio Reg. 2d (P&F) 1147 (Comm'n 1985).

57. The evidence fails to affirmatively show that Ms. Sanders was controlled by her husband George.[7] But that evidence is noted here in order to illustrate that where Ms. Sanders, who has the burden of proof, might have shown an ability to recall details, she could not or would not do so. More importantly, where the evidence shows a one-time active role by a spouse (George) at the promotional stages of a venture, the burden shifts to the second spouse (Elizabeth) to show that she alone controls the one-third interest and that she is not controlled or influenced by her husband in meeting her obligations under operative agreements and the integration proposal. *See Arnold L. Chase*, 5 F.C.C. Rcd 1642, 1644 (Comm'n 1990) (where family relationships are intertwined with business relations, the applicant has the burden of proof to establish that the station will be independently owned and operated). *Compare Alabama Radio Corp.*, 67 F.C.C. 2d 1256, 1263 (Comm'n 1978) (applicant provided detailed account of family members which established independent operation). Through evidence adduced from PIBI's principals it was established that George Sanders had met initially with Pollack and Garrison. George Sanders later introduced Pollack and Garrison to his wife Elizabeth, after a consensus on the structure for the venture had been reached. George Sanders then suggested his wife Elizabeth would provide the opportunity for a female preference. The facts show a predisposition to use Ms. Sanders as a passive participant. There were ongoing synergies between Garrison and Sanders who were in business together and Elizabeth Sanders was their paid employee (secretary, bookkeeper, typist, file clerk, receptionist) for their business in Aliceville. (Garrison, Tr. 158-59.) And Garrison, not Elizabeth Sanders, was instrumental in finding the transmitter site and in arranging for a bank letter. (Paras. 33 to 35.) While this evidence does not support a conclusion that George Sanders was an undisclosed real party-in-interest, it raises circumstantial inferences of George Sanders' influence over Garrison and Elizabeth that were not met or explained away by PIBI. *See Arnold L. Chase*, *supra* and *In re Dorothy J. Owens*, Comm'n *Slip Op.* FCC 90-298, released November 8, 1990, at Para. 12. At a minimum, PIBI should have produced George Sanders as an affirmative witness to explain his role and to permit cross-examination. A leading commentator has stated:

> If a party has it peculiarly in its power to produce witnesses whose testimony would elucidate the transaction, the fact that she does not do it creates the presumption that the testimony, if produced, would be unfavorable.

McCormick On Evidence §272 (1989), cited with approval in *Washoe Shoshone Broadcasting*, 3 F.C.C Rcd. 3948, 3953 (Review Bd 1988). Since PIBI had the burden of proof to discount the inferences that flow from George Sanders' role, its failure to produce George Sanders as a witness for PIBI and tender him for cross-examination results in an adverse inference against PIBI, and the legal conclusion is drawn that George Sanders' participation in PIBI's structure is evidence that he exercised some degree of influence and control over the venture. *See In re Dorothy J. Owens*, *supra* at Para. 11 (control includes "any act" which vests in an individual the right to determine the manner or means of operating a licensee and determining the licensee's policy).

58. Furthermore, the failure on the part of PIBI to show how Elizabeth Sanders exercised her office of treasurer, the misrepresentations to the Commission of her role as treasurer, including her testimony in open court, and the failure to show that PIBI would not be controlled or influenced by George Sanders determine PIBI's proposal to be treated as a "sham." *See Victory Media*, 3 F.C.C. Rcd 2073, 2074 (Comm'n 1988) (where there is a basis in the record for inferring that non-voting shareholders will exercise influence or control of an ongoing business, an applicant's integration proposal will be discredited).[8] *Compare Perry Television, Inc.*, 5 F.C.C. Rcd 1667, 1668 (Review Bd 1990) (totality of evidence, including pre-organizational activities, must be considered and where spouses were found to have exercised influence and control over proposal, no integration credit will be allowed and disqualification of application is warranted).

59. Since PIBI is found to be disqualified, there is no need for any further comparative analysis. Alternatively, if a reviewing authority should find that PIBI must be evaluated without giving credit to Elizabeth Sanders' one-third interest, the statistical result would be a victory for PIBI by default since Wolff's integration is not accepted. Therefore, there is no need to make a mathematical ana-

lysis of the hypothetical statistical significance between the two proposals. *See Cuban-American, Ltd.*, 5 F.C.C. Rcd 3781, 3785 (Comm'n 1990).

PETE WOLFF, III

60. Wolff seeks 100% credit for his proposal to integrate full-time into management. But Wolff should receive no integration credit. PIBI argues that Wolff's commitment to his automobile dealership, where he works 35 hours per week, precludes a finding that Wolff will spend his full-time at the station. (Paras. 38 to 39.) The Commission allows credit for claims of absentee ownership of non-broadcast businesses. *See Omaha TV, Inc.*, 4 F.C.C. Rcd 730 (Comm'n 1989). But the Review Board has refused integration credit claimed even for a *local* franchisee of a restaurant based on the person's testimony that he could handle his franchise commitments of 60 hours per week and that he was committed to work full-time at the station. *See Washoe Shoshone Broadcasting*, 3 F.C.C. Rcd 3948, 3952 (Review Bd 1988), *aff'd on other grounds*, 5 F.C.C. Rcd 5561 (Comm'n 1990). Here Wolff is the sole principal to be integrated while in *Washoe Shoshone* the restaurant franchisee was only one of several principals proposed for integration. The Review Board was concerned that the specifics of the franchise agreement were not considered and weighed against the parole representations of the witness. *Id.* So too here, where Wolff, the sole principal, has a presumedly valuable out-of-town automobile dealership which he intends to keep, there should have been evidence introduced by Wolff to show that his proposal would not jeopardize his dealership. Wolff failed in his burden of proof, for it is not enough to merely assert that he would reduce his hours from 35 to 15 without explaining in sufficient detail how he could manage the dealership on such a reduced commitment.

61. Wolff's proposal also will not be credited because Wolff has not established by a preponderance of credible evidence that he will work full-time at the station. Even though he will divest his interests in WIJK, that only accounts for five hours per week. He still must spend time at the car dealership where he maintains his office and where he proposes to work 15 hours per week. (Para. 39.) There is a distance of 105 miles between Evergreen and Orange Beach which takes 2 1/2 hours to traverse. He is to be the sole manager for integration purposes. Under those circumstances, Wolff must set out a schedule that includes his commitment to Wolff Motors and driving time in order to show by a preponderance of the evidence that he can work full-time as the sole integrated manager. *See Berryville Broadcasting Co.*, 70 F.C.C. 2d 1, 11-12 (Review Bd 1978). Where proof of effectuation of integration by a proponent is lacking, the Commission has denied all integration credit. *See Cuban - American Ltd.*, 5 F.C.C. Rcd 3781, 3785 (Comm'n 1990) where the Commission held under similar circumstances:

> The better procedure is to deny credit where an applicant fails to establish how it will fulfill its integration proposal and to award part-time credit only when an applicant makes a specific showing demonstrating the particular number of hours that it will be integrated on a part-time basis.

Id. at n.3. Accordingly, Wolff cannot receive any integration credit.

62. Wolff proposes to work as much as 60 hours per week at the station. (Para. 39.) Driving between the car dealership in Evergreen and the station at Orange Beach takes five hours daily. Wolff would need to spend several days working long hours each week away from his ongoing Evergreen automobile business. Wolff has failed to show how he plans to accommodate his Evergreen car dealership and his Orange Beach integration proposal. Vacations, business trips and sick days are not even discussed. The Commission will not credit principals' proposals that require a work week exceeding 70 hours. *See Berryville, supra.* Wolff has promised to reduce his time at Wolff Motors to 15 hours per week but he does not explain how the business can survive with such a reduction in Wolff's hours. *Compare Washoe Shoshone Broadcasting, supra.* Certainly, Wolff does not intend to sell the dealership. *Compare Kennebec Valley Television, Inc.*, 2 F.C.C. Rcd 1240, 1242 n. 9 (Review Bd 1987). Since Wolff has not provided a schedule of hours per day or hours per week at Wolff Motors to match against hours proposed to be spent at the station, there can be no meaningful HHI comparative assessment made. *See Cuban American Ltd. supra* at 5785.

63. If Wolff were to receive integration credit, his merits for qualitative enhancements are minimal. Wolff's claimed credit for time spent on property in Gulf Shores owned by his parents is rejected. (Wolff Exh. 1, P:. 2-3.) The Presiding Judge has ruled that such evidence will not be received and that testimony will be afforded no comparative credit. (Wolff Exh. 1 at 2-3 and Tr. 593.) Nor will Wolff receive any credit for the vacation house he bought in Gulf Shores because he has never resided in Gulf Shores. Local residence credit is not awarded solely because an applicant just visits the service area. *Northern Sun Corp.*, 100 F.C.C. 2d 889, 894 (Rev. Bd. 1985). Accordingly, Wolff receives no local residence credit.

64. Wolff will receive only a slight credit for his broadcast experience.[9] Since Wolff has never worked full-time at his stations, and since he acquired those stations only one year before filing his Orange Beach application, he can only receive a slight credit for his past broadcast experience.

Summary Conclusions

65. If qualitative comparative evidence were relevant, Wolff would receive a slight credit for his broadcast experience at WIJK which is greater than no credit for Pollack's part-time activities at Station KXKW in the early '60s. However, Garrison would receive more credit for local residence within the service area and some credit for civic activities. Wolff cannot qualify for any local residence or any local civic activity. The local residence/civic activity credit for Garrison is qualitatively superior to Wolff's broadcast experience. *See Metro Broadcasting, Inc.*, 2 F.C.C. Rcd 1474-75 (Comm'n 1987). But if Elizabeth Sanders' proposal qualified for integration and if 100% integration credit were assigned to PIBI, the local residencies of Garrison and Sanders and their civic activities, plus the female preference for Ms. Sanders would qualitatively make PIBI the winner. However, for reasons stated above, PIBI's proposal does not qualify for consideration.

66. For his part, Wolff has failed to show how he can carry out his integration proposal as sole proprietor in view of his commitments to Wolff Motors at a distance of 105 miles from Orange Beach and, therefore, Wolff's proposal receives no credit. Therefore, if a reviewing authority should credit PIBI's proposal without crediting Elizabeth Sanders' one-third interest, PIBI would be the winner based on integration credit for Pollack and Garrison. But based on the findings and conclusions by the Presiding Judge in this Decision, there is no winner.[10]

ORDER

Accordingly, based on the foregoing, IT IS ORDERED that unless an appeal from this Decision is taken by a party, or unless the Commission reviews this Decision on its own motion,[11] the application of Pleasure Island Broadcasting, Inc. (File No. BPH-871203MO) and the application of Pete Wolff, III (File No. BPH-871203NW) for authority to construct a new FM Station on Channel 298A at Orange Beach, Alabama ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] Initially, there were nine applications set for hearing. Of the nine applicants, only four filed notices of appearances and paid the required hearing fee. The application of Betty P. Barnhill d/b/a RNG Communications was dismissed by *Order*, FCC 89M-1932 (released July 24, 1989). The applications of Opal Carrol Coley, Quaz Communications, Inc. and Coastal Alabama Broadcast Associates were dismissed by *Order*, FCC 89M-2141 (released August 23, 1989). The application of Gulf Shore Radio Limited Partnership was dismissed by *Order*, FCC 89M-2142 (released August 23, 1989). Gulf Shore was a Sonrise enterprise that was dismissed by the Presiding Judge after payment on its hearing fee check was denied payment for an unauthorized signature. *See Order* FCC 89M-2142, released August 23, 1989. The application of J. McCarthy Miller was dismissed by *Order* FCC 90M-417 (released March 2, 1990). The application of Mark Allen Bodiford was dismissed by *Order*, FCC 90M-1017 (released May 1, 1990).

[2] There has been a ruling denying the addition of a real party-in-interest issue against PIBI. *See Memorandum Opinion and Order*, FCC 90M-427, released March 5, 1990 (Presiding Judge found that Wolff had failed to make *prima facie* case that George Sanders was a real party-in-interest).

[3] *Compare* the classical reference of Lewis Carroll to "the Looking-Glass creatures, *whatever they be* /come and dine with the Red Queen, the White Queen and me." Carroll, *Through The Looking Glass* (Random House 1946) at 151. (Emphasis added.)

[4] It is found that Ms. Sanders claims that she became confused at her deposition because questions about payments of PIBI expenses and related issuance of PIBI checks by the authorized signatory (Garrison) were asked twice in the deposition and she became confused the second time that the questions were asked. (Sanders, Tr. 545-46.) But the deposition transcript does not reflect any protestations of confusion at that time and she had an experienced attorney at her side to protect her against confusion and "double teaming" by opposing counsel. Her confusion is an adverse reflection of her credibility and is not the sole result of probing questions from opposing counsel.

[5] Wolff wrote one paragraph on residency findings without reference to any exhibit or testimony. *See* Wolff PFC at Para. 39. The presiding officer has reviewed the record and relies primarily on the referenced proposed findings on those subjects that were filed by PIBI. *See* PIBI PFC at Para. 30.

[6] At the time that Wolff made his divestment commitment, the radio station was a Class A FM on Channel 28. (Wolff, Tr. 606.) Wolff filed a Rule Making petition and succeeded in obtaining on upgrade to C2 in May 1989. (Wolff, Tr. 608.) On May 15, 1990, Wolff filed to further upgrade the station to C1, which petition is still pending. *See Order* FCC 90M-1880, released June 29, 1990.

[7] There is a reasonable expectation that spouses and family members generally will assist one another in business ventures without seeking or succeeding to control the person who is proferred for integration. *Compare Dorothy J. Owens*, 5 F.C.C. Rcd , Comm'n *Slip Op.* FCC 90-298, released November 8, 1990 at Para. 13, citing *High Sierra Broadcasting Co., Inc.*, 96 F.C.C. 2d 423, 435-36 (Review Bd 1983). But because of George Sanders' involvement in structuring the venture and the evidence that he attended several business meetings after the proposal was agreed to and firmed-up and the testimony of Pollack that George Sanders was continually interested in the venture, the failure on the part of PIBI to produce George Sanders as a witness to give his account and to proffer him for cross-examination raises an unrebutted inference of his continuing control and influence to a degree unknown over the PIBI application.

[8] *Victory Media* was recently cited by the Review Board for the same principle. *See Carta Corporation*, 5 F.C.C. Rcd 3696, 3701 (Review Bd 1990). It is recognized by the presiding officer that the Commission also held that pre-organizational activities of limited partners may be permissible. *See Victory Media, supra*. George Sanders' specific activities that are a matter of record are pre-organizational. But Pollack testified that he attended meetings and that his interest continued. It is because of the failure of PIBI to meet its burden of proof to show that George Sanders did not exercise influence or control after the organizational stages that PIBI does not receive the benefit of the *Victory Media* doctrine. *Compare Telestar, Inc.*, 2 F.C.C. Rcd 7352, 7353 (Comm'n 1987).

[9] It is noted that broadcast experience has been the least important enhancement factor so that qualified newcomers are not barred from broadcasting. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 396, 5 RR 2d 1901, 1910 (1965).

[10] The Review Board has held that there will not be a winning applicant where none is found to qualify for a grant. *See Port Huron Family Radio, Inc.*, 4 F.C.C. Rcd 2532, 2540 (Review Bd 1989). See also *Coastal Bend Family Television, Inc.*, 95 F.C.C. 2d 551, 553 (Review Bd 1983).

[11] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-422

In re Application of

THOMAS M. EELLS File No. BPH-880825NO

For Construction Permit for a
New FM Station on Channel 283A
in Saginaw, Michigan

Appearances

James K. Edmundson, Esq., Mark Van Bergh, Esq. and *Pamela C. Cooper, Esq.* on behalf of Thomas M. Eells; and *Charles E. Dziedzic, Esq.* and *Jerry M. Hermele, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF
ADMINISTRATIVE LAW JUDGE
RICHARD L. SIPPEL

Issued: November 26, 1990; Released: December 7, 1990

PRELIMINARY STATEMENT

1. This is a ruling on a Motion For Summary Decision that was filed on November 7, 1990, by the sole surviving applicant, Thomas M. Eells ("Eells"). Also under consideration is a related engineering amendment filed contemporaneously with a Petition For Leave To Amend. The Mass Media Bureau ("Bureau") filed its Comments in support of the motion and the amendment on November 19, 1990.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

2. On October 29, 1990, Eells and three former applicants filed a Joint Request For Approval Of Agreement which was intended to be a universal settlement. The request was granted and three applicants were dismissed with prejudice. *See Memorandum Opinion and Order*, FCC 90M-3531, released November 6, 1990.

3. However, left unresolved by that ruling on settlement was an air hazard issue set against Eells under the *Hearing Designation Order* DA 90-1233 (5 F.C.C. Rcd 5810) released October 9, 1990. The Bureau had specified the issue because of a discrepancy between Eells' application and the Commission's records concerning the tower coordinates and height of the existing tower which Eells proposes to use. Eells has filed a contemporaneous Petition for Leave to Amend and amendment to his application which conforms his proposal to the Commission's records for the existing tower, and of the FAA's approval of that tower.

4. The evidence establishes that with acceptance of the amendment, Eells' application will conform to the Commission's records which show that the FAA has determined that the existing tower which Eells proposes to utilize does not constitute a hazard to air navigation. Eells proposes to side-mount his antenna on the existing tower, a modification resulting in no increase in height and obviating the need for further notification to the FAA.

5. Eells' change of coordinates removes the only impediment to a grant of his now uncontested application for a construction permit for a new FM station at Saginaw, Michigan. Thus, the Bureau supports a grant of the petition for leave to amend, the motion for summary decision, and an award of the construction permit to Eells.

6. FAA approval negates any need for further evidence since the FAA's determination is conclusive as a matter of law in the absence of any substantial evidence to the contrary. *Southern Capital Television, Inc.*, 43 F.C.C. 2d 197 (1974). Thus, upon acceptance of Eells' amendment there will remain no genuine issue of material fact for determination at the hearing, and the Presiding Judge may grant summary decision.

7. The Commission's rules provide that in considering a motion for summary decision:

> The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). As the moving party, Eells has the burden of establishing that summary decision would be appropriate based on his papers. *Summary Decision Procedures*, 34 F.C.C. 2d 485, 487-88 (1972). Eells is found to have sustained this burden.

8. In light of the conclusive evidence found in the FAA's determination that Eells proposed structure would not pose a hazard to air navigation, there is no genuine issue of material fact that remains to be resolved. *See also* Bureau's Comments (Eells is entitled to summary decision on the air hazard issue). Therefore, summary decision is appropriate.

RULINGS

IT IS ORDERED that the Petition For Leave To Amend filed on November 7, 1990, by Thomas M. Eells IS GRANTED and the engineering amendment showing revised technical data for an existing tower to be side-mounted IS ACCEPTED.

IT IS FURTHER ORDERED that the Motion For Summary Decision filed by Thomas M. Eells on November 7, 1990, IS GRANTED and the air hazard issue cited against Eells is resolved in the applicant's favor.

IT IS FURTHER ORDERED that the application of Thomas M. Eells (File No. BPH-880825NO) for a construction permit for a new FM Station on Channel 283A at Saginaw, Michigan IS GRANTED.

IT IS FURTHER ORDERED that this proceeding IS TERMINATED by summary decision.[1]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTE

[1] This *Summary Decision* disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ALEGRIA I, INC. — **MM DOCKET NO. 84-159**
Marina, California — File No. BP-811015AJ

Elizabeth Waters, — **MM DOCKET NO. 84-160**
Phyllis Moore, — FILE No. BP-8110015AK
Gloria McKinley, and
Verna Rolls d/b/a
HERITAGE COMMUNICATIONS
Yountville, California

For a Construction Permit
for a new AM Station

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 1990; Released: December 7, 1990

By the Commission:

I. BACKGROUND

1. This proceeding involves the mutually exclusive applications of Heritage Communications and Alegria I, Inc. for a new AM radio station. Principally at issue is the order designating Heritage's application for comparative hearing along with those of Alegria and other, now-dismissed, applicants. *Arby R. Beardslee*, Mimeo No. 2547 (Feb. 29, 1984). The Mass Media Bureau designated Heritage's application under delegated authority despite the fact that Heritage filed major amendments to its application that Alegria claims should have resulted in the dismissal of Heritage's application. Subsequently, the Commission denied review of the designation order. The Commission also denied review of a Review Board decision finding that Heritage's proposal would better provide a fair, efficent, and equitable distribution of broadcast service pursuant to 47 U.S.C. § 307(b) and that, therefore, Heritage's application should be granted and Alegria's denied. *Alegria I, Inc.*, 4 FCC Rcd 587 (1989). *See also Alegria I, Inc.*, 61 RR 2d 136 (Rev. Bd. 1986), *recon. denied*, 2 FCC Rcd 1762 (Rev. Bd. 1987).

2. On June 15, 1990, the United States Court of Appeals for the District of Columbia Circuit remanded this case to the Commission for further proceedings. *Alegria I, Inc. v. FCC*, 905 F.2d 471 (D.C. Cir. 1990). The court faulted the Commission for failing to explain adequately why Heritage was permitted to withdraw major amendments to its application, which otherwise would have resulted in the dismissal of its application.

3. The parties were requested to submit comments as to what action would be appropriate on remand. *Alegria I, Inc.*, FCC 90I-66 (Jun. 22, 1990). Alegria, Heritage, and the Bureau filed comments on August 13, 15, and 17, 1990, respectively. Alegria and Heritage filed reply comments on August 23 and September 7, 1990, respectively.[1] Upon examination of the parties' comments and the record in light of the court's remand order, we conclude that, for the reasons that follow, Heritage's application was correctly retained in hearing status.

II. HERITAGE'S AMENDMENTS

4. The material facts of this case are largely undisputed. On October 15, 1981, Heritage filed its application, specifying 2.5 kW daytime power and 250 watts nighttime power. Heritage's application was mutually exclusive with applications of Alegria and several others no longer involved in this proceeding.

5. Under 47 C.F.R. § 73.3571, new applications and applications for major changes[2] are assigned a file number based on when they are filed, and the Commission's staff processes the applications in numerical order beginning with the earliest filed application. 47 C.F.R. § 73.3571(c). Periodically, the Commission issues a public notice listing the applications ready for processing and specifying a date on which applications mutually exclusive with the listed application and petitions to deny the listed application may be filed. *Id.*

6. The rule further provides that, if an amendment to an application constitutes a major change, the application is assigned a new file number. 47 C.F.R. § 73.3571(j)(1). Once an application is assigned a new file number, it loses its priority in the processing line. In cases in which mutually exclusive applications have already been accepted for filing, the assignment of a new file number causes the application to lose the right to comparative consideration with the other mutually exclusive applications.

7. In considering amendments, the rule treats as a major change any amendment modifying an engineering proposal, involving new or increased interference problems with existing stations or other pending applications. Specifically, the rule states:

> If, after submission and acceptance of such an engineering amendment, subsequent examination indicates new or increased interference problems with either existing stations or other applications pending at the time the amendment was received at the FCC, the application will then be assigned a new file number and placed in the processing line according to the numerical sequence of the new file number.

47 C.F.R. § 73.3571(j)(1).

8. On April 9, 1982, after the cut-off date for filing new applications, Heritage filed an amendment providing for a new transmitter site for daytime and nighttime operation and an increase in nighttime power from 250 watts to 1 kW. Although Heritage's amendment was initially accepted, the Commission's staff subsequently advised Heritage that its amendment constituted a major change within the meaning of 47 C.F.R. § 73.3571, and on December 15, 1982, issued an erratum deleting Heritage's application from the list of accepted applications.

9. In response, on December 17, 1982, Heritage filed a new amendment withdrawing the April amendment's power increase and nighttime transmitter site change but retaining the change in daytime transmitter site. On December 27, Alegria moved to dismiss Heritage's application on the ground that the April 9 amendment was

major and was not cured by the December 17 amendment withdrawing the nighttime power increase. In the hearing designation order, the Bureau denied Alegria's motion, holding that the December 17 amendment served to withdraw the earlier amendment as it pertained to the nighttime power increase (which clearly made it a major amendment under the rules) and that the December 17 amendment was itself a minor amendment. Mimeo No. 2547 at 4-5 ¶ 8.

10. On March 2, 1983, the Commission released a public notice accepting Heritage's application (as modified by the December 17 amendment). Subsequently, The Pete Pappas Company, the owner of station KTRB in Modesto, California, filed a petition to deny Heritage's application, alleging that the signal of Heritage's proposed station would interfere with that of KTRB. Heritage, without conceding the accuracy of the allegations in Pappas' petition, thereupon filed an amendment on July 8, 1983, changing the location of its proposed daytime transmitter site, thereby mooting Pappas' allegations.

11. Then, on August 15, 1983, Beardslee Broadcasting, Inc., which at the time was a mutually exclusive applicant in this proceeding, filed a petition alleging that Heritage's July 8 amendment would cause increased interference to Beardslee's pending application. Beardslee urged that Heritage's application be assigned a new file number.

12. In designating this case for hearing, the Bureau found that the July 8 amendment would indeed cause increased interference to the Beardslee proposal and that it thus constituted a major amendment under 47 C.F.R. § 73.3571(j)(1). Mimeo No. 2547 at 5 ¶ 10. The Bureau concluded, however, that Heritage would prefer to withdraw its amendment rather than to lose its status in the hearing and thus it did not accept the amendment. *Id.* The Bureau found that the Heritage proposal thereby reverted to a state in which it caused interference to KTRB in violation of 47 C.F.R. § 73.37(a) (which requires new AM stations to protect other AM station on the same and adjacent channels). *Id.* Although the Bureau recognized that normally the Heritage application would be dismissed under these circumstances, the Bureau did not dismiss Heritage's application. Mimeo No. 2547 at 5 ¶ 11. The Bureau noted that Heritage would have 30 days to file a corrective amendment [3] and held that the public interest would be better served by retaining Heritage's application in hearing status and giving Heritage 30 days in which to file a corrective amendment if it were able to do so. *Id.*

13. On March 2, 1984, Heritage, Beardslee, and two other applicants filed a settlement agreement proposing the dismissal of Beardslee's application, thereby eliminating the problem that had previously prevented acceptance of the July 8 amendment.[4] On April 5, 1984, the Presiding Judge approved the settlement agreement and dismissed Beardslee's application. *Arby R. Beardslee*, FCC 84M-1655 (Apr. 5, 1984). Heritage then, on April 6, refiled its July 8 amendment, which the ALJ accepted. *The Pete Pappas Co.*, FCC 84M-2025 (Apr. 27, 1984).

14. On April 23, 1987 (after the Review Board released its decision granting Heritage's application), Alegria filed applications for review challenging the Board's decision and the hearing designation order's failure to dismiss Heritage's application. The Commission denied review without addressing the question of whether Heritage should have been permitted to remain a party to the hearing proceeding.

III. COURT OF APPEALS

15. The court remanded this proceeding for further consideration of Heritage's amendments. In so doing, the court accepted the Commission's contention that, during the relevant time period, the Commission had a policy permitting the withdrawal of major amendments. Moreover, the court acknowledged that the public interest may well favor "a common sense amelioration of the otherwise harsh consequences of the rule . . . ." 905 F.2d at 474. The court observed, however, that the Commission nowhere (either in the hearing designation order or the order denying review) explicitly invoked that policy or explained why it justified the succession of major amendments here. The court held that simply invoking the "public interest" was an insufficient explanation.

16. Moreover, the court questioned whether the facts of the present case fit within the scope of the Commission's policy. The court pointed out that in previous cases the Commission had explained that its policy was to permit applicants to withdraw inadvertently filed major amendments where they would not result in harmful disruptions and to permit the applicant to return to the *status quo ante*. Here, the court noted, Heritage did not seek to return to the *status quo ante* but instead was permitted to file a succession of amendments until its application was viable. The court stated that, if the Commission believes that this represents a reasonable extension of its policy, the Commission must provide an adequate explanation and define the parameters of the applicable policy.

IV. THE PARTIES' COMMENTS

17. Alegria contends that, under the plain language of the Commission's rules, the filing of each of Heritage's three amendments required the dismissal of its application. Alegria further contends that Heritage may not take advantage of changes in Commission policy that permitted applicants filing major amendments to withdraw them to avoid dismissal, since these changes in policy occurred after the time period at issue in this case.[5] *See Revision of Sections 73.3571, 73.3572 and 73.3573 of the Commission's Rules to Permit Withdrawal of Disqualifying Major Change Amendments*, 5 FCC Rcd 2993 (1990), *codifying, Golden Shores Broadcasting, Inc.*, 2 FCC Rcd 4743 (1987) (where the Commission held that it permitted the withdrawal of major amendments).

18. Additionally, Alegria asserts that, even if the *Golden Shores* policy applied to this case, the circumstances surrounding Heritage's amendments do not fall within the scope of that policy. According to Alegria, the *Golden Shores* policy permits the withdrawal of otherwise disqualifying amendments only where doing so would avoid procedural disruption by returning the application to the *status quo* existing before the filing of the amendment. Alegria argues that the withdrawal of Alegria's amendments never reinstated the *status quo*. Thus, Alegria maintains that Heritage's application should be dismissed and Alegria's granted.

19. Heritage responds that *Golden Shores*, which merely restated prior Commission practice, clearly applies to the time period involved in this case. Moreover, Heritage urges that the circumstances of this case fall within the scope of the *Golden Shores* policy, and Heritage's application was correctly retained in hearing status rather than being dismissed. This is so, Heritage argues, because: (1) the withdrawal of Heritage's amendments did not result in

processing delays or prejudice to other applicants; and (2) the public interest was served by retaining a larger pool of applicants. According to Heritage, retaining its application in hearing status was an equitable result and comports with the Commission policy of not applying its rules in a draconian fashion.

20. The Bureau agrees that Heritage was correctly permitted to withdraw its major amendments (April 9 and July 8) consistent with existing Commission policy. In particular, the Bureau maintains that according Heritage 30 days after designation to further amend its application, rather than dismissing the application, did not prejudice Alegria or significantly delay the proceeding.

21. In reply, Alegria argues that the mere filing of Heritage's three amendments, not their acceptance by the Commission, triggered the provisions in the rules requiring the dismissal of Heritage's application.[6] (In any event, Alegria submits that the April 9 and December 17 amendments were accepted by the Bureau as well as filed.) Additionally, Alegria contends that the facts of this case did not come within the *Golden Shores* policy, even if that policy were in effect at the relevant time. In Alegria's view, the filing of Heritage's amendments occasioned repeated processing delays and prejudiced Alegria. Moreover, the withdrawal of these amendments never resulted in reinstitution of the *status quo*, as contemplated by *Golden Shores*. Consequently, Alegria maintains that Heritage's application should be dismissed.

22. Heritage, in its reply, contends that the court's remand does not require the dismissal of its application but merely requires the Commission to provide a fuller explanation of why Heritage's application was retained in hearing status. In particular, Heritage asserts that the court concurred that the *Golden Shores* policy applies to this case. With respect to its July 8 amendment, Heritage argues that there was no need for it to return to the *status quo* because facts known to the Bureau prior to designation indicated that the various interference problems could be expeditiously resolved. Heritage points out that the parties had reached a settlement proposing the dismissal of the Beardslee application on December 21, 1983, but that the Bureau had returned the settlement because of the imminence of the designation order. Heritage maintains that it acted conscientiously in filing its amendments.

V. DISCUSSION

23. We agree with Heritage and the Bureau that the retention of Heritage's application in hearing status was in accord with Commission policy and supported by equitable considerations. We now hold that the policy enunciated in *Golden Shores* applies to this case and that, pursuant to that policy, the Bureau need not have assigned a new file number to Heritage's application and dismissed it from this proceeding.

24. Contrary to Alegria's contention, the Court of Appeals did not question the applicability to this case of the Commission's policy permitting applicants to withdraw major amendments.[7] As we noted in *Golden Shores* (2 FCC Rcd at 4474 ¶ 8), the Commission had commented favorably on this practice before, and during the time, Heritage filed its amendments. *See Redwood Television Ministries, Inc.*, 52 RR 2d 1365, 1369 n.14 (1982); *Grace Missionary Baptist Church*, 80 FCC 2d 330, 337 ¶ 11 (1980). *Golden Shores* itself simply further explained this policy, and the Commission's later rule making merely codified the existing policy.[8] *Revision of Sections 73.3571, 73.3572 and 73.3573 of the Commission's Rules to Permit Withdrawal of Disqualifying Major Change Amendments*, 5 FCC Rcd 2993 ¶ 6 (1990). *See also Golden Shores*, 2 FCC Rcd at 4744 n.6. Similarly, the court raised no doubts as to the validity of the Commission's policy. Paragraph 15, *supra*.

25. Additionally, the court did not reject the finding made in the hearing designation order (and reiterated in the Commission's brief) that only the April 9, 1982 and July 8, 1983 amendments were major and could have triggered the assignment of a new file number (the December 17, 1982 amendment being minor). 905 F.2d at 474. *Accord*, 905 F.2d at 476 (Williams, J. concurring) ("As the Commission never made a final finding on the interference problems of the December amendment, it need not be presumed to be a suicidal amendment.") *See also* Brief for Appellee at 12, *Alegria I, Inc. v. FCC*, 905 F.2d 471 (D.C. Cir. 1990). We therefore address the circumstances surrounding the April and July amendments to determine whether permitting their withdrawal comported with the rationale of the *Golden Shores* policy. In evaluating the possibility that Heritage's amendments caused harmful disruption, we will focus on the circumstances surrounding the filing of each of the amendments as they appeared at the relevant time, rather than on the cumulative impact that Heritage's amendments have had. This is so, because there is no reason to penalize Heritage merely for making good faith attempts to address successively unforeseen changing circumstances. Changing circumstances may, of course, delay the processing of applications to some extent, even where an applicant's conduct has been entirely proper.

26. In this regard, we observe that 73.3571(j) was adopted to eliminate the costly and prejudicial delays necessitated by the repetitive reprocessing of applications. It was not intended to penalize applicants who inadvertently filed major amendments where no harmful disruption would occur. *Golden Shores*, 2 FCC Rcd at 4744 ¶ 8. *See generally AM Processing Procedure*, 18 RR 1565 (1959). We did not intend that the rule be applied in a draconian manner. *Revision*, 5 FCC Rcd at 2993 ¶ 6.

27. With this in mind, we turn first to the April 9, 1982 amendment. The filing of this amendment was an obvious mistake. The amendment was clearly a major amendment, since it proposed an increase in nighttime power; yet, Heritage designated it on the pertinent form as a "minor" amendment. Amendment filed April 9, 1982, item 3(a). Thus, it was possible for the error to be promptly discovered and harmful disruption prevented. Moreover, allowing Heritage to cure its error did not abridge any cognizable rights of Heritage's competitors. *See Crosthwait v. FCC*, 584 F.2d 550, 555 (D.C. Cir. 1978) (an applicant has no vested interest in the disqualification of a competing applicant).

28. As Alegria points out, the withdrawal of the April 9 amendment did not restore the *status quo ante* because Heritage did not rescind that portion of the amendment proposing a new daytime transmitter site. However, the record of this case does not suggest that the interference problem associated with this new site (involving KTRB) was foreseen either by Heritage or by the processing line at the time Heritage filed its December 17 curative amendment.[9] Rather, the withdrawal of the amendment appeared to cure the amendment's known objectionable

aspect, the proposed increase in nighttime power.[10] Hence, from the Bureau's and Heritage's points of view, the corrective amendment served to return the application to the *status quo ante* (for the purposes of the *Golden Shores* policy) in all relevant respects. The fact that the corrective amendment did not withdraw the change in Heritage's daytime transmitter site was not a relevant factor in considering whether there would be harmful disruption at the time Heritage sought to take corrective action. Rather, the change in daytime transmitter site seemed to be an innocuous aspect of the amendment. For this reason, the Bureau was justified in concluding that allowing Heritage to withdraw the April 9 amendment was consistent with the *Golden Shores* policy of preventing harmful disruption. It would not be appropriate to judge the propriety of the Bureau's action on the basis of facts that were not before the Bureau when the action was taken. In this regard, we note that the Bureau in its comments has defended its prior action and has expressed no concern that the integrity of its processing procedures has been jeopardized.

29. We further believe that the *Golden Shores* policy should be interpreted to permit Heritage to withdraw its July 8 amendment without dismissal. Heritage filed this amendment -- which was objectionable because it caused increased interference with the Beardslee proposal -- in an understandable effort to eliminate the interference problem with existing station KTRB. Although the withdrawal of the amendment left Heritage with an unacceptable application for a brief period, the Bureau, in the hearing designation order, correctly anticipated that this situation would be expeditiously resolved by circumstances without harmful disruption. As noted, Heritage had already submitted a settlement agreement, which, if acted upon, would have obviated the Beardslee overlap problem prior to designation and thus the need to withdraw the July 8 amendment. The resubmission of the settlement after designation quickly eliminated the problematic nature of the July 8 amendment, permitting its prompt refiling and acceptance.

30. As was the case of the April 9 amendment, withdrawal of the July 8 amendment did not literally comport with *Golden Shores*, this time, because withdrawal of the amendment reinstated a *status quo ante* that required further action to make Heritage's proposal viable. However, the Bureau reasonably concluded, in light of Heritage's imminent prospects for settlement, that allowing Heritage to withdraw the amendment and remain in hearing status would not result in harmful delay, inconsistent with *Golden Shores*. Moreover, in its comments the Bureau supports its prior action in this respect. Thus, we believe that given the facts set forth above, Heritage was properly allowed to withdraw the major amendments to its application which were filed prior to the designation of this proceeding for hearing.

VI. ORDERS

31. ACCORDINGLY, IT IS ORDERED, That the Commission's Memorandum Opinion and Order, FCC 88-422 (Jan. 13, 1989) (4 FCC Rcd 587) IS MODIFIED as provided herein.

32. IT IS FURTHER ORDERED, That the application of Heritage Communications for a construction permit (File No. BP-811015AK) IS GRANTED and the application of Alegria I, Inc. (File No. BP-811015AJ) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The General Counsel granted an extension of time for the filing of comments. *Alegria I, Inc.*, FCC 90I-93 (Aug. 15, 1990). Alegria complains that this extension was improvident because Alegria's objections were inadvertently overlooked. Additionally, Heritage sought an extension of time to file its reply comments. In both instances, Alegria argues, among other things, that it has been prejudiced because the other parties had an opportunity to examine Alegria's pleadings before filing their own. Having carefully examined the pleadings, we see no possibility that Alegria has been materially prejudiced. Consequently, we deny Alegria's Petition for Reconsideration of Order filed August 24, 1990, and, good cause having been shown, we grant the Motion for Extension of Time filed August 20, 1990 by Heritage.

[2] The rule defines major changes as any increase in power, or change in frequency, hours of operation, or station location.

[3] The Bureau apparently referred to 47 C.F.R. § 73.3522(b)(2), which permits applicants in comparative cases to file as a matter of right amendments relating to issues first raised in the designation order. *See also James River Broadcasting Corp. v. FCC*, 399 F.2d 581, 583 (D.C. Cir. 1968) (applicant may cure defective application by timely amendment).

[4] The parties had previously submitted their settlement to the Mass Media Bureau on December 21, 1983, prior to designation. The Bureau returned the settlement without prejudice to its being refiled after designation because it was received so close to the completion of the hearing designation order. Letter from Larry D. Eads, Chief, Audio Services Division to George Waters, Heritage Communications (Feb. 7, 1984).

[5] Alegria asserts that Heritage must have been aware of the strict nature of the rule because at one point Heritage itself relied on the rule in seeking the dismissal of Alegria's application. This circumstance has no relevance, since it is the the validity of the Commission's treatment of Heritage's application that is at issue, not the validity of Heritage's claim against Alegria.

[6] Alegria cites 47 C.F.R. § 73.3522(a)(1), which states that prior to designation for hearing an application may be amended "merely by filing the appropriate number of copies of the amendment in question duly executed . . . " (After designation for hearing, amendments must be accompanied by a petition demonstrating good cause. 47 C.F.R. § 73.3522(b)(1).) In view of the fact, as explained below, that the Commission has an established policy interpreting the effect of 47 C.F.R. § 73.3571 in dealing with major amendments, the wording of the rule pointed out by Alegria does not control the disposition of this case.

[7] "We do not quarrel with the FCC's assertion that a policy permitting the withdrawal of a major amendment existed at the time of the various proceedings here." 905 F.2d at 474.

[8] In light of the foregoing and for simplicity, we will refer to the Bureau's actions in this case in terms of the " *Golden Shores* policy" even though the relevant events occurred before *Golden Shores*.

[9] Pappas raised the question of interference with the existing facilities of KTRB in its Petition to Dismiss or to Deny Application filed April 8, 1983. In that pleading, Pappas alleged that Heritage's proposed 25 mV/m groundwave signal contour (on 840 kHz) would overlap KTRB's existing 2 mV/m contour (on 860 kHz) in violation of 47 C.F.R. § 73.37(a). Pappas acknowledged that Heritage's amendment indicated on its face that no prohibited overlap would occur. However, Pappas stated that its measurements showed that the soil conductivity in the pertinent area was significantly higher than the standard values set forth in the Commission's rules, which Heritage had relied on. Petition at 2-3. Rather than conducting its own time consuming field measurements of soil conductivity, Heritage elected to amend its application to eliminate the alleged problem with KTRB. Petition for Leave to Amend filed July 8, 1983 by Heritage at 1-2.

[10] Heritage specifically indicated in opposing Alegria's motion to dismiss that it filed its December 17 amendment in response to being advised by the Bureau that the proposed increase in nighttime power would be treated as a major change. Opposition to Motion to Dismiss Application filed January 10, 1983 by Heritage at 2-3.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 87-389

In the Matter of

Revision of Part 15 of the Rules
regarding the operation of radio
frequency devices without an
individual license - American
Radio Relay League petition
for reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 1990; Released: December 7, 1990

By the Commission:

1. By this action the Commission denies a Petition for Reconsideration filed on May 25, 1989, by the American Radio Relay League, Incorporated (the League).[1] The League requests that the Commission reconsider and reverse certain portions of the *First Report and Order* in this proceeding.[2] Therein, the Commission revised Part 15 of the regulations governing the non-licensed operation of radio frequency (RF) devices. [3] The League is concerned that such devices have the potential to both cause interference to, and receive interference from, stations operating in the Amateur Radio Service. The Commission finds that the League presents no new information in its petition that would justify a further change in the Part 15 rules.[4]

BACKGROUND

2. In the *First Report and Order*, the Commission adopted technical standards and other policies intended to balance the competing goals of minimizing the potential for Part 15 devices to cause interference to authorized services and providing reasonable opportunity for operation of a broad range of non-licensed RF equipment that would have significant benefits for the public. The Commission attempted to eliminate all unnecessary and overly restrictive regulations in order to provide greater flexibility in the operation of non-licensed Part 15 equipment. In some instances, however, the technical standards were actually made more restrictive in order to protect the authorized services, such as the Amateur Radio Service, from potential harmful interference.

3. In order to minimize the probability that harmful interference might be caused to the authorized services, the Commission, *inter alia*, subjects Part 15 devices to limits on emissions radiated through the air or conducted through the power line.[5] In the *First Report and Order*, the Commission adopted new radiated and conducted limits for Part 15 devices. These new limits were based on the Commission's experience as to emission levels that will not create undue risk of interference to authorized radio services; the former Part 15 Class B (residential use) computing device limits; and, the recommendations of the U.S. Department of Commerce, National Telecommunications and Information Administration (NTIA).[6] To provide additional protection to sensitive authorized services that involve communications related to safety-of-life situations or that depend on reception of very low level signals, the Commission established several restricted frequency bands within which Part 15 intentional radiators may not operate.[7] Only spurious emissions are permitted in the restricted bands.[8] The Commission also authorized the operation of Part 15 devices at higher emission levels on frequency bands allocated to industrial, scientific, and medical (ISM) devices.[9] Several of these bands, *e.g.*, those above 900 MHz, are also allocated for amateur use.

4. In adopting the new Part 15 rules, the Commission considered several requests presented by the League including special protection for the amateur services, more restrictive emission limits for Part 15 devices, and requirements for manufacturers of Part 15 devices to provide interference resolution materials to consumers. The Commission found that the newly established emission limits and other general provisions of the Part 15 rules would be adequate to protect the amateur radio and other authorized services from interference by Part 15 devices and declined to adopt the measures proposed by the League.

SUMMARY OF PETITION AND COMMENTS

5. In its petition, the League contends that the Commission erred in a number of aspects of its decision in the *First Report and Order*. The League's basic position is that the Commission did not correctly evaluate the impact of the new Part 15 rules on both the amateur radio service and consumers of home electronic devices. It states that the Commission did not adequately consider the League's engineering data and disregarded the many comments by amateur operators discussing the interference potential of Part 15 devices. The League also presents a new study based on an "advanced" engineering model. The conclusion of this study is that the signal levels permitted under both the former and new Part 15 rules are, on amateur frequencies, in excess of those which can cause serious interference in amateur receivers and that the interference area of a single Part 15 emitter is extremely large, ranging from 750 to 1,750 meters, depending on the frequency of the emission. The League further claims that the Commission did not consider its own records of interference complaints, which the League states indicate a far more serious level of interference than assumed in the *First Report and Order*.

6. The League argues that as a result of these errors, the Commission has adopted field strength limits for both intentional and unintentional radiators that are too high to provide authorized services adequate protection from interference. It also asserts that the new bands available for operation of Part 15 devices at higher power levels that coincide with amateur bands invite serious interference problems for large numbers of both consumers and amateurs. To remedy this situation, the League requests that the Commission limit the emissions of Part 15 intentional and unintentional radiators on amateur frequencies to the levels specified under the former rules.

7. The League again asks the Commission to prohibit the operation of Part 15 devices (intentional radiators) on amateur frequencies. It contends that the amateur service meets the criteria indicated in the *First Report and Order*

as necessary for restricted band status in that the amateurs provide safety-of-life communications and make use of low received signal levels.

8. The League asserts that the Commission's refusal to require even minimal education and protection material in the packaging of home electronic equipment leaves the non-technical consumer without a means for resolving interference problems. It requests that the Commission require manufacturers of interference susceptible Part 15 equipment to incorporate interference resolution information in the owner's or user's manual of that equipment, including a company address that can provide assistance to the non-technical consumer.

9. The Computer and Business Equipment Manufacturers Association (CBEMA), the Consumer Electronics Group of the Electronic Industries Association (EIA/CEG), General Motors Research Corporation (GM), and Wireless Technology, Incorporated (Wireless) filed oppositions to the League's Petition for Reconsideration. These parties support the basic policy approach embodied in the new rules and oppose the modifications requested by the League.

10. The commenting parties support the general emission limits for Part 15 devices adopted by the Commission. The EIA/CEG states that the new rules provide a reasonable balance of the need to protect authorized services from harmful interference with the need to allow for the consumer benefits made possible by electronic equipment authorized under Part 15. It agrees with the Commission's determination in the *First Report and Order* that many of the changes in Part 15 either do not affect amateur operations or actually reduce the potential for Part 15 devices to cause interference to amateurs.

11. CBEMA states that the League's arguments that the continuation or adoption of the Class B digital device limits without technical justification ignore the substantial record that was developed over the last 15 years, during which those limits were adopted and applied. It observes that the adoption of the Class B limits in Docket No. 20780 was based in large measure on a technical study submitted by CBEMA itself. It states that this study fully documented, both theoretically and empirically, the approach used to calculate the emission limits. CBEMA further states that, contrary to the League's position, the absence of interference complaints is evidence validating the standard. CBEMA submits that the Commission's experience with the interference assessment method, coupled with nearly a decade of experience with the Class B standards, establishes a fully reasoned basis for the decision to expand the use of those limits.

12. GM states that the League's technical analysis overstates the amount of additional interference that will result from the new rules. It submits that the League implicitly seeks to protect against the worst case, so that there would be no possibility that a Part 15 device would ever degrade any amateur service. It further states that while there are no doubt serious problems with the FCC's compilation of interference complaints, these records are the most reliable indication available of the real world as opposed to worst case conditions. GM submits that if the interference situation with respect to Class B computing devices were as bad as the League claims, the public would long ago have made it clear that this was unacceptable.

13. GM and Wireless state that while the League is correct that interference from amateur, ISM and even government operations is possible to Part 15 devices operating in the ISM bands above 900 MHz, there are many applications in these bands where such interference will not be a problem. They state that to prevent all uses because some uses may be subject to interference is overregulation of the worst sort. GM states that the League's entire discussion of this fails to acknowledge that susceptibility to interference is under the control of the equipment designer and is not a preordained fact.

14. The EIA/CEG also argues that amateur frequencies should not be included in the restricted bands. It submits that a radio service used primarily for personal communications, "self-training" and advancement of the radio art should not merit equal stature with services involving safety-of-life or services that are required by the nature of their operation to use signals at low levels. EIA/CEG also argues that the League has not explained why the amateur service deserves more protection than other services such as broadcasting and public safety land mobile radio.

15. The EIA/CEG contends that a requirement forcing manufacturers to provide interference resolution information, including a manufacturer's contact, for Part 15 equipment is unnecessary. It states that such a requirement would present manufacturers with additional costs and burdens. EIA/CEG states that many manufacturers and retailers already provide information and assistance to consumers, including "800" numbers and that market forces will continue to induce them to provide assistance to the consumer.

16. The League filed comments in reply to the above oppositions. In reply to GM's assertion that it would be unjustified to prevent all Part 15 users from operating on the shared ISM and amateur frequencies just because some users may be subject to interference, the League now states that it opposes the operation on these frequencies of new Part 15 devices in residential areas only. The League's reply comments also contain a new "best case" engineering study in which the effects of interference from Part 15 devices to the amateur radio service have been minimized. The League claims that, even assuming the greatest possible attenuation, the interference contours are still objectionably large.

DISCUSSION

17. We continue to believe that the rules set forth in the *First Report and Order* afford adequate and appropriate interference protection to the amateur service from the operation of Part 15 devices. We find that the additional restrictions and requirements the League seeks are unnecessary. We have carefully examined the League's submissions, which are essentially the same as those presented in its comments earlier in this proceeding, and conclude that our assessments and decisions in the *First Report and Order* are correct.

18. We maintain our finding that the general radiation limits adopted in the *First Report and Order* provide adequate protection to the amateur service from interference caused by Part 15 devices. Many of the Part 15 changes either do not affect amateur operations or would actually reduce the potential for Part 15 devices to cause interference to amateurs. The areas of the new Part 15 rules which the League believes allow higher emission levels and/or encourage a greater number of Part 15 devices in

the amateur bands are the general radiated emission limits for intentional radiators operating between 1.705 and 960 MHz and, the provisions for the new general bands,[10] as provided in 47 CFR Section 15.249, in which emission levels higher than the general limits are permitted.

19. The general radiated emission limits in the new rules provide that the maximum allowable field strength in the 1.705-30 MHz band is 30 uV/m at 30 meters, based on measurements employing a CISPR quasi-peak detector.[11] Under the former regulations, the radiated emission limit for the 1.705-10 MHz band varied depending on the bandwidth of the emission, ranging from an average field strength of 15 uV/m at 30 meters for certain narrowband signals to 100 uV/m at 30 meters for wideband signals.[12] The new general limit is based on the lowest permitted value of the former limit with an increase, from 15 uV/m to 30 uV/m only, to compensate for the effect of the change in measurement procedures.[13] Thus, for the 1.705-10 MHz band the new general limit is 6 dB less stringent for narrowband operations only. For wideband operations, the new limit for the 1.705-10 MHz band is more stringent. Over the short distances involved, the propagation characteristics for the 1.705-10 MHz and the 10-30 MHz band are similar. In addition, in terms of required interference protection, the types of authorized radio services operating within the 10-30 MHz band are also similar to those operating in the 1.705-10 MHz band. The limit established for the 1.705-10 MHz band was therefore applied to the 10-30 MHz band as well.

20. Although we appreciate the League's fears of increased interference in the 1.705-30 MHz band, they are unfounded. We are unaware of any interference to amateur operations from Part 15 devices operating in the 1.705-10 MHz band under the higher limit of 100 uV/m.[14] The large numbers of licensed users effectively preclude the general operation of Part 15 devices at the lower general limit in the 1.705-30 MHz band. Only those devices used in relatively shielded areas can be used at the Part 15 general emission limits. It is not likely that this situation will change.

21. The general limits adopted for intentional radiators operating in the frequency band 30 to 960 MHz are identical to the long established limits which apply to Class B computing device emissions on the the same frequencies. The derivation of the Class B computing device limits, which have been in effect for over ten years, is contained in the *First Report and Order* in Docket No. 20780.[15] As noted by CBEMA, these limits are based upon a comprehensive technical analysis including required interference protection for amateur frequency bands. These limits have proven adequate over the last ten years of the Commission's experience in protecting the authorized services from harmful interference by Class B computing devices. As observed by CBEMA, our previous successful experience with these limits provides sufficient basis for their use as general emission limits on frequencies between 30 and 960 MHz.

22. With respect to the new general bands above 900 MHz, we note that thousands of Part 15 field disturbance sensors have been operating on frequencies allocated to the amateur services at significantly higher emission levels than permitted for general operations under the new rules.[16] These existing devices do not appear to be causing interference problems for the amateur service.

23. As far as interference by amateur stations to the new Part 15 devices operating in these frequency bands, we continue to believe, with the support of GM and Wireless, that there are many applications in these bands where interference will not be a problem. As stated by GM, susceptibility to interference is under the control of the equipment designer and is not a preordained fact. We do not believe that manufacturers will design products that are unable to cope with the radio environment in the frequency bands selected for operation. Negative publicity generated by consumer magazines and other sources will force manufacturers of poorly designed products to either improve their products or leave the market.

24. The Commission did consider the League's original interference study in adopting the new Part 15 emission limits. Neither the League's original study, its new engineering study contained in its petition for reconsideration, nor the study submitted by the League in its reply comments persuade us that the present Part 15 emission limits are insufficient to protect the amateur radio service from harmful interference. We find that the League's analyses are based on inappropriate or questionable assumptions that tend to overestimate the likelihood of interference. For example, the study in the petition is based on propagation conditions that are inappropriate for the suburban environments where the League alleges interference will occur.[17] In the study submitted in its reply comments, the League uses a different propagation model that takes into account the effect of buildings and foliage conditions more typical of the suburban environment. We observe that this change reduces the predicted interference contour from the Part 15 device by a factor of more than ten (from 640 meters to 50 meters for the frequency band 216 to 960 MHz). While the League claims this is a best case scenario, we believe it is merely more realistic of actual conditions. Moreover, the League's analysis assumes that the maximum permitted signal from the Part 15 device will be received by the amateur receiver. The conditions necessary for this to occur in practice will be rare. For example, a Part 15 device would have to be configured so that it is producing the maximum permitted signal, coincident in frequency with and oriented in the direction of the amateur receiver in order to interfere with reception. This is not likely to occur very often. We therefore continue to believe that the emission limits as adopted in the *First Report and Order* are adequate to guard against significant degradation of the amateur service by Part 15 devices.

25. The Commission also considered the numerous comments from individual amateur operators in adopting the new Part 15 emission limits. These comments generally identified three sources of interference: TV receivers, incidental radiators,[18] and computers. To the extent that TV receivers have caused any difficulties in the past, it should be noted that emission limits for TV and other receivers have been tightened. Incidental radiators have not been the subject of our technical standards, nor were such standards proposed in this proceeding. The number of references to computers were so few that we are led to believe such incidences of interference were caused by non-compliant or co-located computing devices. Our own records do not indicate any serious interference problems caused by equipment operating in compliance with the Class B emission limits.

26. We do not agree with the League's position that amateur frequencies should be included in the restricted bands. The Commission established the restricted bands to provide an extra measure of protection for services that primarily involve communications related to safety-of-life situations or that depend on reception of very low level signals. For example, safety-of-life frequencies include maritime, aeronautical, and mobile distress and safety channels, certain bands used to warn pilots when dangerous wind shear conditions exist around airports, and aeronautical radionavigation bands. Low level signal bands include radio astronomy frequencies and satellite space-to-earth channels. The presence of interfering signals on channels routinely used for safety-of-life communications could have serious consequences for individuals or the public. Similarly, even low level background noise on bands used for services whose basic functions rely on very low level signal levels could disrupt the operation of the affected services.

27. While we believe it is important and necessary to provide protection for the amateur radio service against interference by Part 15 devices, the same as we do for other authorized services, we do not find that the amateur service needs the additional protection afforded to the users of services indicated above. While we certainly recognize the valuable assistance amateur radio operators sometimes render in emergency situations, such activity is not the sole or primary function of the amateur service. Rather, as EIA/CEG observes, the amateur service is used primarily for personal communications, self-training and advancement of the radio art. We also would expect that if an amateur were experiencing interference from a nearby Part 15 device, he/she could take action to resolve that interference before a situation involving the need for emergency communications arose.

28. In addition, while amateurs often engage in long distance communications that rely on low level signals,[19] they also engage in many other types of operations that can tolerate considerable levels of background noise. Moreover, amateur operations typically involve recreational and hobbyist activities that can, if necessary, be repeated. Finally, we observe that the amateur service is afforded only a secondary or lesser allocation on many of the bands for which it requests restricted status.[20] It would make little sense to restrict Part 15 operations in these bands to protect amateur operations when the primary services on these bands have priority over the amateur service and do not themselves warrant restricted band status. Similarly, as noted by EIA/CEG, we have not found it necessary to expand the restricted bands to other important services such as broadcasting and public safety land mobile services, which include police, fire, and rescue operations. Accordingly, we are not including the amateur frequencies in the Part 15 restricted bands.

29. Finally, we are rejecting the League's request that manufacturers be required to provide interference resolution information in the Part 15 owner's or user's manual. The present FCC rules already require that Part 15 devices (with the exception of licensed radio service receivers and stand-alone cable input selector switches which have alternative labelling requirements) be labelled with a statement that states "this device must accept any interference received, including interference that may cause undesired operation."[21] We continue to believe that it would be unnecessarily burdensome for manufacturers to be required to provide interference resolution information for devices that are not protected from interference.

30. Accordingly, pursuant to the authority contained in Section 4(i) and 303 of the Communications Act of 1934, as amended, and Section 1.106 of the Commission's rules, IT IS ORDERED that the Petition for Reconsideration filed by the American Radio Relay League, Incorporated IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In addition to the subject Petition for Reconsideration, the League filed a Motion for Stay in this proceeding on May 25, 1989, which was subsequently denied by the Commission. *See Order Denying Petitions for Stay* in GEN Docket No. 87-389, 4 FCC Rcd 7869 (1989). The Court of Appeals for the District of Columbia Circuit similarly denied an Emergency Motion for Stay of Agency Action Pending Review filed by the League on June 20, 1989. *See American Radio Relay League, Inc. v. FCC and USA*, No. 89-1393, (D.C. Cir., June 21, 1989).

[2] *See First Report and Order*, GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989).

[3] Devices which emit radio frequency energy are termed radio frequency (RF) devices. Radio frequency energy is defined as electromagnetic energy at any frequency in the radio spectrum between 9 kHz and 3,000,000 MHz. *See* 47 CFR 15.3(u).

[4] Several other petitions for reconsideration of the *First Report and Order* in this proceeding have also been filed. These petitions are being considered separately in other Commission actions.

[5] The energy conducted back onto the public utility (AC) power line can radiate from the power line. Interference from this type of emission usually occurs in the spectrum below 30 MHz. The Commission's rules specify limits on the amount of RF voltage conducted back onto the public utility (AC) power line in order to protect authorized services such as AM broadcasting and amateur radio.

[6] *See First Report and Order*, *supra*, at para. 20.

[7] An intentional radiator is a device that intentionally generates and emits RF energy by radiation or induction. An unintentional radiator is a device that intentionally generates RF energy for use within the device, or that sends RF signals by conduction to associated equipment via connecting wiring, but which is not intended to emit RF energy by radiation or induction. *See* 47 CFR Section 15.3(o) and (z).

[8] A spurious emission is an unintentional emission that occurs on a frequency or frequencies outside of the intended operating frequency band. *See id.* at paras. 61-74 and 47 CFR Section 15.205.

[9] *See id.* at paras. 55-60 and 47 CFR Sections 15.225, 15.227, 15.229 and 15.249.

[10] These new bands are 902-928 MHz, 2400-2483.5 MHz, 5725-5875 MHz, and 24.0-24.25 GHz.

[11] *See* 47 CFR Section 15.209.

[12] Under the former rules, narrowband signals were those with a bandwidth less than +/- 5% of the center frequency. Wideband signals were those with bandwidth at least +/- 5% of the center frequency. *See* CFR Section 15.114 of the regulations in place prior to June 23, 1989.

[13] Because of the change in measurement technique from average to quasi-peak, this new limit is not substantially higher than the former limit since the quasi-peak readings are typically several dB higher than average readings for most modulations.

[14] Since 1986, Part 15 devices have been allowed to operate within the 1.705-10 MHz band with a maximum radiated field strength of 100 uV/m at 30 meters. *See Report and Order*, GEN Docket No. 85-129, 51 FR 4366 (1986).

[15] *See First Report and Order* in Docket No. 20780, 44 FR 59530 (1979).

[16] A field disturbance sensor is a device that establishes a radio frequency field in its vicinity and detects changes in that field resulting from the movement of persons or objects within its range. *See* 47 CFR Section 15.3(l).

[17] The League's study uses measured attenuation factors from a paper entitled "HF and VHF Radio Wave Attenuation Through Jungle and Woods," by Seymour Krevsky, IEEE Transactions on Antennas and Propagation, July 1963.

[18] An incidental radiator is a device that generates radio frequency energy during the course of its operation although the device is not intentionally designed to generate or emit radio frequency energy. Examples of incidental radiators are dc motors, mechanical light switches, etc. *See* 47 CFR Section 15.3(n).

[19] For example, a common amateur activity is to try to contact as many other distant amateur stations as possible. This practice is commonly known as "DX-ing."

[20] For example, within the 902-928 MHz frequency band the Amateur Radio Service is secondary to all other allocated operations. Stations in the amateur service must tolerate any interference received from the operation of ISM, Automatic Vehicle Monitoring systems and Government stations authorized within this band. Amateur stations operating within the 2400-2450 MHz, 5725-5875 MHz, and 24.0-24.25 GHz frequency bands must also accept any harmful interference caused by ISM equipment and U.S. Government stations operating in these bands. *See* 47 CFR Section 2.106.

[21] *See* 47 CFR Section 15.19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-540

In re Applications of

CSJ INVESTMENTS, INC.	File No. BPH-870615MK
David H. Smith, Maureen L. Smith, James E. Spisiak, Patrica B. Spisiak d/b/a KEYS BROADCASTING SYSTEM	File No. BPH-870615MW
SOUTH STAR COMMUNICATIONS, INC.	File No. BPH-870615ND

For Construction Permit for New FM Station, Channel 300C1
Key West, Florida

MEMORANDUM OPINION AND ORDER

Adopted: November 27, 1990; Released: December 7, 1990

By the Commission:

1. By a Memorandum Opinion and Order, FCC 90M-1043, released May 2, 1990 (*MO&O*), the ALJ dismissed South Star's application with prejudice. The Review Board affirmed the dismissal. *CSJ Investments, Inc.*, 5 FCC Rcd 3741 (Rev. Bd. 1990). We have before us an application by South Star for review of the Board's affirmance, filed on July 25, 1990, and an opposition thereto filed by CSJ Investments, Inc.

2. The ALJ and the Board found that there were two independent grounds for dismissing South Star: lack of a transmitter site and failure to prosecute. We agree that dismissal is independently warranted on each of those grounds. However, brief comment is waranted in order to correct a minor error in the Board's ruling regarding the site issue.

3. The ALJ and the Board concluded that South Star's application is defective because it admittedly lacks reasonable assurance of the availability of the transmitter site that it originally proposed and because it failed to show good cause for acceptance of an amendment specifying a new site. *MO&O* at ¶ 10; 5 FCC Rcd at 3744 n.3.[1] South Star asserts that the Board erred in concluding that the rejection of its amendment meant that it had no transmitter site. It maintains that the rejection of the amendment merely means that it must rely upon its original site, which South Star declares that it is willing to do.

4. In this regard, South Star notes that the Board, in concluding that it lacked site assurance referred to South Star's statement, in its appeal from the ALJ's dismissal order, that it had learned that "the assurances of site availability upon which it then relied were made without authority." 5 FCC Rcd at 3744 n.3. South Star argues that the Board mischaracterized the statement in describing it as an admission that the original site was unavailable. South Star maintains that the statement referred to the availability of the *new* site specified by its amendment, not to the original site. We agree with South Star in this respect; the statement that the Board cited does not refer to the availability of the original site. Our recognition of this error does not lead us to reverse the holding that South Star lacks assurance of the availability of its proposed transmitter site, however, for we find that South Star had previously admitted in other contexts that its original site was unavailable.

5. South Star admitted as much in a pleading for an extension of time in which to file its site amendment. It declared in that pleading that its engineering consultant had informed it of "the probable unavailability" of its original site and that it had concluded from a further assessment by its counsel that "although the [original] site may not be absolutely unavailable continued specification would be unrealistic." "Request for Extension of Time" filed February 2, 1990. Counsel for South Star confirmed at the prehearing conference of February 21, 1990 that his client had conceded that the original site was no longer available and declared that it no longer had any intention of using that site. Tr. at pp. 7 and 10. And in pleading for acceptance of the site amendment, South Star asserted that it had encountered difficulty in finding a new site "after learning that its previously designated site was not available." "Motion for Leave to File Documents Late" filed April 11, 1990 at 2.

6. We thus find, in agreement with the Board, that, by its own uncontradicted admission, South Star has no reasonable assurance that the transmitter site that its application specifies will be available. As its application fails to identify an available transmitter site and as no acceptable curative amendment has been proffered, we affirm the dismissal of South Star's application for want of an available site. *See Goodlettsville Broadcasting Co., Inc.*, 5 FCC Rcd 4593, 4594 ¶¶ 10-11 (1990).

7. ACCORDINGLY, IT IS ORDERED that the application for review filed by South Star Communications, Inc. on July 25, 1990 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] In its application for review, South Star does not directly contest the ALJ's ruling rejecting its proposed site amendment. It merely asserts that some of the circumstances that the ALJ mentioned in this connection -- that the proffered site amendment lacked a supporting affidavit and a proper signature -- are immaterial. However, the ALJ did not reject the amendment

solely for those reasons; he gave many other sound reasons for doing so, FCC 90M-1043 ¶¶ 5-6, none of which South Star disputes. Thus, South Star's assertion is not decisionally significant.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-27

Applications of	
MIAMI LATINO BROADCASTING CORP.	File No. BPCT-840921KJ
LAMAR COMMUNICATIONS, INC.	File No. BPCT-840921KK
ADIB EDEN, SR.	File No. BPCT-840921KM
CORAL WAY BROADCASTING, LTD.	File NO. BPCT-840921KN
RANGE COMMUNICATIONS, LIMITED PARTNERSHIP	File No. BPCT-840921KR
GRACE BROADCASTING NETWORK, INC.	File No. BPCT-840921KS
MINORITY BROADCASTING CORPORATION, INC.	File No. BPCT-840921KT
FIRST LATIN WOMAN BROADCASTING, INC.	File No. BPCT-840921KU
For Construction Permit for a new Television Station on Channel 35, Miami, Florida	

ORDER

Adopted: November 27, 1990; Released: December 7, 1990

By the Commission:

1. Before the Commission for consideration are a Commission Memorandum Opinion and Order, *Cuban American, Limited*, 5 FCC Rcd 3781 (1990); Petitions for Reconsideration filed on July 19, 1990 by Lamar Communications, Inc., July 23, 1990 by Adib Eden, Sr., and July 25, 1990 by Range Communications, Limited Partnership and by Grace Broadcasting Network, Inc.; Oppositions filed August 1, 1990 by Lamar and September 7, 1990 by Miami Latino Broadcasting; and a Reply filed September 18, 1990 by Eden; and a Motion to Strike filed September 19, 1990 by Grace.[1]

I. BACKGROUND

2. Lamar, Range and Grace argue that we erred in awarding Miami Latino credit for the integration of Beverly Smith. Eden argues that we erred in failing to overturn the Review Board's conclusion (*Cuban - American Limited*, 2 FCC Rcd 3264, 3266-67 ¶¶ 12-14 (1987)), that he failed to have reasonable assurance of site availability.

3. The Petitions for Reconsideration are procedurally deficient and will be dismissed. 47 C.F.R. § 1.106(b)(2) provides that we will only grant reconsideration where:

> (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or
>
> (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

Petitioners have failed to present new facts or changed circumstances as required by Section 1.106(b)(2).[2]

4. Moreover, the arguments raised in the petitions for reconsideration concerning the award of integration credit were fully considered in our Memorandum Opinion and Order affirming the grant of Miami Latino's application. It is well established that reconsideration will not be granted to debate matters upon which we have already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). Nevertheless, matters are raised in the Petitions for Reconsideration which merit further comment.

II. SMITH'S INTEGRATION CREDIT

5. Grace argues that crediting Miami Latino for the integration of Beverly Smith is inconsistent with the denial of credit to both Miami Latino for the integration of Joseph Molina and First Latin Woman Broadcasting, Inc. for the integration of Diana Madero. Grace asserts that none of those principals made an explicit commitment to terminate their existing employment. It supports the denial of credit for Molina and Madero but argues that the Commission applied a different standard in crediting Smith's integration proposal.

6. The record establishes that Smith signed a two year contract to be a talk show hostess on AM Station WGBS, Miami, in February 1985. The contract provided WGBS with a right of first refusal for a third year. Smith was still employed by WGBS when the ALJ issued his Initial Decision, *Cuban-American Limited*, 85D-76, released December 30, 1985. In May 1986 Smith terminated the contract with WGBS and signed a one year contract to host a show on WKIS, Orlando, Florida. Asserting that Miami Latino cannot upgrade its application by the post decisional termination of Smith's employment contract,

and that she did not make a specific pledge to terminate her employment. Grace argues that Miami Latino cannot be credited for her integration proposal.

7. In denying review, we found that, although Smith did not expressly pledge to terminate her employment, the limited duration of her employment contracts was consistent with her integration proposal. When Miami Latino's proposal was considered during the hearing, it was reasonable to find that her 1985 employment contract would be concluded before this proceeding ended, the construction of Miami Latino's proposed station was completed and Smith would be involved in the management of an operating station. Smith's 1985 contract would have expired by February 1988 at the latest (assuming that WGBS exercised its right of first refusal for a third year) and her subsequently reported 1986 contract expired in 1987. The ALJ did not complete the evidentiary phase of the proceeding until the end of 1985 and we have previously determined that two years is a realistic time period for construction of a station. *Amendment of Sec. 73.3598*, 102 FCC 2d 1054, 1057 (1986). Therefore, even assuming that the case had concluded without appeals to the Board, Commission or the Court of Appeals, it would not have become final under 47 C.F.R. § 1.276(d) until February 1986, and it would have been unlikely for Smith to have been in a position to operate the station until 1988 in any event, allowing for the normal construction time frame. We also agree with the Board that Smith's agreement to be a talk show host was compatible with her non-talk show position of general manager of Miami Latino's proposed station. *Cuban - American Limited*, 2 FCC Rcd at 3269 ¶ 22. Thus, neither contract constituted an obstacle to her ability to carry out her integration commitment. In sum, there was no reason to doubt Smith's ability and willingness to carry out her integration commitment at the time of the evidentiary hearing and there is now no information in the record showing any impediment to that integration proposal. We therefore reject the contention that crediting Smith's integration proposal represents a prohibited upgrading.

8. In contrast, the record shows that Molina and Madero have continuing employment of indeterminate duration and, absent a specific commitment to terminate that employment, the record provided no basis to conclude that they would be able to carry out both their full-time integration proposals and their current employment responsibilities. Under these circumstances, crediting Smith's integration proposal is fully consistent with the denial of credit for Molina's and Madero's integration proposals.

9. Range also attacks Smith's integration proposal, arguing that it should not be credited because she has no financial stake in the applicant, she had no role in the formation and prosecution of Miami Latino's application, legal control of the applicant is vested in Molina who has a 51 per cent voting interest, and the application was financed by Kevin McMahan, who owns a non-voting interest. Range concludes that we must deny credit for Smith's proposed integration.

10. Recently, in *Royce International Broadcasting*, 5 FCC Rcd _____ (1990), we articulated the standards under which we credit integration proposals. These standards insure that applicants, that have submitted integration proposals that fully identify the interests of all principals and reliably establish that they will fulfill their integration commitments receive credit for their integrated ownership interests. In *Royce* we said that we would discount an integration proposal where "(1) a principal holding a small or passive interest (rather than the supposedly active owner) is in a position to dominate the applicant's affairs; (2) a person with no disclosed ownership interest (again, rather than the supposedly active owner) is in a position to exercise significant control over the applicant; or (3) the assertedly active principal has exercised little, if any, significant control over the applicant and has not shown any real prospect of doing so." 5 FCC Rcd _____ at ¶ 10 (footnote deleted), citing *Metroplex Communications, Inc.*, 5 FCC Rcd (1990); and *KIST Corp.*, 102 FCC 2d 288, 292 ¶ 8, 292-93 n.11 (1985).

11. Applying *Royce* to the facts of this case, we reaffirm the award of credit for Smith's integration. McMahan, who is Miami Latino's principal financier, has limited his contact with Molina and Smith and is a passive investor in the applicant. *See* 2 FCC Rcd at 3270 ¶¶ 26-27. Moreover, Smith is an experienced broadcaster, who has a significant financial stake in Miami Latino. She is legally obligated to pay her share of the application expenses and will personally co-guarantee a $5 million loan for the construction of the proposed station (Tr. 1533-34, 1537, 1550, 1643-44, 2820); she retained her own attorney to assist her negotiations with McMahan and Molina (Tr. 1521, 1529); and she reviewed and evaluated Miami Latino's application with her own attorney (1528-29, 2809-12). Thus, Smith has been actively involved in the prosecution of Miami Latino's application, and has shown that she is entitled to credit for her role in the management of the proposed station.

12. Finally, Lamar, citing *Multiple Ownership Rules*, 97 FCC 2d 997, 1008-09 (1984), 47 C.F.R. § 73.3555, argues for the first time that Smith's ownership interest is not cognizable for integration purposes because another shareholder holds a 51 per cent voting interest in the applicant. This argument is procedurally and substantively defective. First, as reflected in its citation of our 1984 rule making, Lamar does not rely on new or changed circumstances as required by Section 1.106(b). Second, in the context of comparative hearings, the Commission has recognized that owners with minority interests can influence the operations of a station irrespective of whether there is a single majority stockholder, and it has consistently given weight to such interests for integration purposes. *See Omaha TV 15, Inc.*, 4 FCC Rcd 730 (1988); and *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064 (1989), *recon. denied* 5 FCC Rcd 581(1990). Moreover, Section 73.3555 applies to the attribution of ownership interests for diversification purposes, and is designed to proscribe the undue concentration of control of media interests, while the integration criterion is designed to encourage applicant participation in the management of broadcast stations. To refuse to credit the integration of owners with less than controlling interests would be inconsistent with our goal of encouraging the maximum involvement of ownership interests in the management of their proposed stations. In any event, Note 2 to Section 73.3555 provides that all interests of officers and directors of a broadcast station are cognizable and subject to the multiple ownership rules, and Smith is an officer of Miami Latino.

13. ACCORDINGLY, IT IS ORDERED, That the Petitions for Reconsideration filed July 19, 1990 by Lamar Communications, Inc., July 23, 1990 by Adib Eden, Inc., and July 25, 1990 by Range Communications, Limited

Partnership and by Grace Broadcasting Network, Inc.; and the Motion to Strike, filed September 19, 1990 by Grace Broadcasting Network, Inc., ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Grace moves to strike the arguments in Miami Latino's opposition concerning the Commission's failure to fully credit Miami Latino's integration proposal. Because we are not relying on the additional integration credit claimed by Miami Latino, Grace's Motion to Strike will be dismissed as moot.

[2] Eden's Application for Review was denied without comment. Eden argues that reconsideration may be warranted under 47 U.S.C. § 1.106(m) because it can not determine the extent to which the Commission considered the arguments in its Application for Review. Eden has mis-cited Section 1.106(m), which provides that reconsideration is a condition precedent to judicial review where the Commission has not had an opportunity to pass on the matters raised on review. Here, Eden's arguments were fully considered by the ALJ and the Board, and the Commission had an opportunity to consider those arguments when they were raised in Eden's Application for Review.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-507

In re Applications of

DALE A. GANSKE (hereafter "Ganske")	File No. BPH-881212MB
WIBU, INC. (hereafter "WIBU")	File No. BPH-881214ML
WAUNAKEE PARQUE BROADCASTING CO. (hereafter "Parque")	File No. BPH-881215MD

For Construction Permit
for a New FM Station
in Waunakee, Wisconsi n
Channel 286A (105.1 MHz)

HEARING DESIGNATION ORDER

Adopted: October 11, 1990; Released: December 6, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Ganske*. Ganske petitioned for leave to amend his application on June 7 and July 18, 1990. The accompanying amendments were filed after April 10, 1989, the last day for filing amendments as of right. Under Section 1.65 of the Commission's Rules the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

3. *WIBU*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. WIBU has not completed Item 4 correctly. WIBU's application apparently gives a business rather than residential address for David H. Bornstein, one of its principals. Accordingly, WIBU must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

4. *Other Matters*. Whereas the Federal Aviation Administration has determined that the antenna site proposed by Parque would be a hazard to air navigation, no determinations have been received regarding those proposed by Ganske and WIBU. Accordingly, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by the applicants would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Ganske ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That WIBU shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the

hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-506

In re Applications of

MONTAUK COMMUNICATIONS, LIMITED PARTNERSHIP (hereafter "MCLP")	File No. BPH-890913MP
CATHERINE BROADCASTING INCORPORATED (hereafter "Catherine")	File No. BPH-890921ND
EILEEN FARBMAN (hereafter "Farbman")	File No. BPH-890921NE
WOMEN BROADCASTERS, INC. (hereafter "Women")	File No. BPH-890921NF

For Construction Permit
for a New FM Station
in Montauk, New York
Channel 235A (94.9 MHz)

HEARING DESIGNATION ORDER

Adopted: October 11, 1990; Released: December 6, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Farbman has filed such statement, it is deficient. Farbman has not listed any recruitment sources for women. Accordingly, Farbman will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

3. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Farbman shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

7. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

Walter Communications Inc. — File No. 15807-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service Station on E-group Channels at Visalia, California

MEMORANDUM OPINION AND ORDER

Adopted: November 30, 1990; Released: December 7, 1990

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced application of Walter Communications, Inc. (Walter) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Visalia, California area was selected for qualification review as the result of a Commission lottery. The Committee for Fair MDS Lotteries (Committee) filed a post-lottery Petition to Deny,[1] challenging the application. Walter filed a Reply.

2. *Pleadings*. In its Petition, the Committee alleges that Walter, together with fifteen other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications under different corporate names. All sixteen of these applicants filed applications for Visalia. The petitioner contends that the events leading up to the filing of these "cookie-cutter" applications,[3] the familial[4] or business relationships among certain applicants, the preparation of the applications under the direction and at the expense of Bruce Merrill,[5] the similarities in technical and other information among the applications, and the Letter of Understanding between Walter and Bruce Merrill[6] should lead the Commission to conclude that Walter failed to disclose the identity of the real-party-in-interest to its application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a). In addition, the Committee alleges these same facts demonstrate that Walter filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the one-to-a-market rule. The Committee also contends that Walter failed to disclose its affiliation with its intended or likely subscriber, Bruce Merrill, in violation of Section 21.900 of the Commission's Rules, 47 C.F.R. § 21.900.

3. In its Reply, Walter asserts it has not violated the real-party-in-interest and one-to-a-market rules because "no one other than Walter Merrill has ever held an ownership interest in, or control over [Walter's] applications." Reply at 2.

4. *Discussion*. In a recent line of cases, the Court of Appeals for the District of Columbia Circuit clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont*); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz*).

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988)(hereinafter cited as *Astroline*). In the instant case, the Committee alleges violations of real-party-in-interest, one-to-a-market, and affiliation disclosure rules. After consideration of the Committee's allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. *Id.*, 857 F.2d at 1563, 1573; *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989). Proof that Walter failed to disclose the real-party-in-interest and filed multiple applications would alter the Commission's public interest determination. *See, e.g., David Lausisen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car. Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987).

6. Having found that the petition to deny comports with the requirements enunciated at 47 U.S.C. § 309(d)(1), we now reach the question of the substantiality or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). The Committee's allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[8] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[9] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[10] The Committee's allegations of rule violations are based upon evidence that Bruce Merrill directed the preparation of and paid for "cookie-cutter" applications that were filed.[11] However, "[t]here is no indication in the record that [Bruce] Merrill has any financial interest or responsibility for any of the applications." *VCI*, 2 FCC Rcd at 1898. In its Reply, Walter states in rebuttal: "Any assistance that Walter Merrill received from his father was simply a normal incidence of a father-son family relationship." Reply at 2. Walter also asserts that "no one other than Walter Merrill has ever had an ownership interest in [Walter]. Furthermore, no one but Walter Merrill is or will be in a position to actually or potentially control the operation of [Walter's] proposed MMDS facilities." Reply at 13. We find the Committee's unsubstantiated evidence insufficient to establish the existence of a real-party-in-interest violation or a one-to-a-market rule violation, in light of Walter's rebuttal. *VCI*, 2 FCC Rcd 1895 (1987); *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

8. The Committee also alleges that Walter violated the affiliation disclosure provision of Section 21.900 because it failed to submit a statement disclosing the affiliation or relationship between Walter and Bruce Merrill, an intended or likely subscriber. Walter argues that there was no need to submit an affiliation statement pursuant to Section 21.900 because Walter Merrill's relationship with Bruce Merrill is not financial or business related, but is familial. "Merrill Communications has never had nor will it ever have, any 'financial or business' interest in [Walter] other than as a lawful customer of [Walter's] carrier services." Reply at 11.

9. We note that at the time Walter initially filed its application, the application disclosed that Bruce Merrill would be the intended or likely subscriber for Walter's MMDS station at Visalia. By the terms of the rule provision, Walter had a duty to disclose any affiliation or relationship between Walter and Bruce Merrill or Merrill Communications. The terms "affiliation or relationship" have been defined for purposes of Section 21.900 as any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the subscriber, excepting only the carrier-user relationship. *Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616, 618 (1974). The Committee failed to allege that the admitted relationship between Walter and its intended subscriber was a financial or business relationship. Therefore, we find that there is no substantial or material question of fact which requires an evidentiary hearing with regard to violation of the affiliation disclosure provisions of Section 21.900 in this instance.

10. In *VCI*, the Commission found that the Letter of Understanding between Bruce Merrill and Walter "raises questions concerning the applicant's intent to comply with Title II of the Communications Act." 2 FCC Rcd at 1900. *See* 47 U.S.C. § 202(a); *see also* 47 U.S.C. § 201. Walter is reminded that the Commission imposed in that order a condition on any MMDS authorization Walter obtains requiring an offering to the public without unreasonable preference or discrimination for sixty days. "During that 60 day period, [Walter] may not accept Bruce Merrill, MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer-programmer." *Id.*

11. *Ordering Clause*. Having carefully considered all the pleadings and the evidence submitted by the parties, we find the allegations raised by the Committee, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, IT IS ORDERED that the Petition to Deny filed by The Committee for Fair MDS Lotteries IS HEREBY DENIED.

12. This order is issued pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan, Chief
Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, the Committee incorporated by reference the pleadings it filed in *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987) (hereinafter cited as *VCI*).

[2] The fifteen other applicants are B.F. Investments, Inc., Champion Industries, Inc., Fortuna Systems Corp., Line of Site, Inc., Mettler Communications, Inc., Microwave Video Services, Inc., Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Communications, Inc., Stephen Communications, Inc., Video/Multipoint, Inc., Virginia Communications, Inc., and Wireless Services, Inc.

[3] The Committee asserts that Bruce Merrill instigated Walter's MMDS application submission. Petition at 7, n. 14.

[4] Bruce Merrill is the father of Walter Merrill, the president, 100% stockholder, and co-director of Walter Communications, Inc.

[5] Petition at 6, n. 11.

[6] This Letter of Understanding states that Bruce Merrill, through his company, Merrill Communications, Inc. or MerrillCom, will provide programming services to Walter, if it is a successful MMDS applicant, in consideration of the pre-filing services performed by Bruce Merrill.

[7] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[8] The Committee argues that Bruce Merrill, through his company, Merrill Communications, as an undisclosed real-party-in-interest, was the applicant for more than one MMDS

application in Visalia. If true, there would exist violations of both of these rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd at 2054.

[9] Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[10] At the time this MMDS application was filed and at the time of the lottery, Section 21.901(d)(2) provided:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[11] We note that the Committee failed to submit an affidavit to support its allegations pursuant to 47 U.S.C. § 309(d)(1). And, the Committee did not provide the amount of specific facts to substantiate its allegations as was provided by Astroline against the Arch transfer application in *Astroline*, 857 F. 2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not sufficient." *Beaumont*, 854 F.2d at 507.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
GTE HAWAIIAN TELEPHONE COMPANY, INC.
MCI INTERNATIONAL, INC.
TRT/FTC COMMUNICATIONS CORPORATION
US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP
WORLD COMMUNICATIONS, INC.

File No. I-T-C-90-072

Joint Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable System Between Hawaii and New Zealand

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: November 8, 1990; Released: December 10, 1990

By the Commission:

1. The Commission has under consideration the above-captioned Joint Application filed on March 15, 1990, by American Telephone and Telegraph Company (AT&T), GTE Hawaiian Telephone Company Incorporated (HTC), MCI International, Inc. (MCII), TRT/FTC Communications, Inc. (TRT/FTC),[1] US Sprint Communications Company Limited Partnership (US Sprint) and World Communications, Inc. (Worldcom) (hereinafter the Joint Applicants). The Joint Applicants seek authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214, to construct and operate a high capacity digital optical fiber submarine cable system, known as the PacRimEast cable system (PacRimEast), extending between Keawaula, Hawaii in the United States on the north and Takapuna, New Zealand on the south. PacRimEast will be jointly owned by twenty-three telecommunications administrations and carriers, including the Joint Applicants. The Joint Applicants propose that PacRimEast will be in service in the first quarter of 1993.

2. The Joint Applicants also seek authority to (1) acquire capacity in PacRimEast; (2) acquire by lease such extension facilities as may be required to extend the capacity in PacRimEast; (3) activate and operate capacity in PacRimEast and the aforementioned extension facilities for the provision of their respectively authorized telecommunications services; and (4) convey to their correspondents or to non-owners, on an indefeasible right of user (IRU) basis, half-interests in certain capacity currently assigned to a Joint Applicant to permit said IRU recipients to provide their authorized services over PacRimEast.

3. The Joint Application was placed on public notice on March 21, 1990. A petition to deny was filed by Pan American Satellite (PAS) and comments were filed by the State of Hawaii. AT&T and HTC, individually, filed reply comments in response to State of Hawaii, and TRT/FTC filed a letter opposing PAS' petition. The State of Hawaii filed responsive comments to AT&T's reply.[2]

I. THE APPLICATION

4. The Joint Applicants will use PacRimEast to supplement their existing facilities in the provision of service that each applicant presently is furnishing or subsequently may furnish between the United States and New Zealand and Australia. PacRimEast will interconnect with the respective domestic networks in the United States and New Zealand and will be extended by suitable facilities to the borders of other countries participating in PacRimEast or to the terminals of other international communications systems, including other cable terminals and satellite earth stations. [3]

5. The Construction and Maintenance Agreement (C&MA) for PacRimEast was initialed on September 29, 1989. The cable system consists of three segments: Segments A and C are, respectively, the cable stations at Takapuna, New Zealand and Keawaula, Hawaii. Segment B consists of the whole of the submarine cable system provided between and including the System Interfaces at Segments A and C. The System Interface is defined as the nominal 140 Megabits per second (Mbits/s) digital input/output ports on the digital distribution frame (excluding the digital distribution frame itself) where the 139,264,000 bits per second digital line section connects with other transmission facilities or equipment.

6. The portions of the PacRimEast cable to be supplied by AT&T will use AT&T's latest 1.55 micron laser technology operating at 565 Mbits/s on each working pair.[4] The capacity of each fiber pair is provided in four 140 Mbit/s streams. Each 140 Mbit/s stream contains 1890 minimum assignable units of ownership (MAUOs).[5] The capacity of PacRimEast (Segment B) will be 7560 MAUOs. For voice services, digital circuit multiplication equipment can be employed to derive 150 virtual voice paths from a 30 MAUOs. To ensure the highest possible reliability, a standby transmission path, that is capable of being switched between repeaters, will also be provided.[6]

7. The estimated total cost of the PacRimEast cable system and the estimated Joint Applicants' combined share of the capital cost associated with each subsegment of the cable are as follows:

PacRimEast Cable System Estimated Costs

Segment	Total Cost (Millions)	Combined Joint Applicants' Share (Millions)
Segment B (Total Transmission Portion)	$275.0	$66.8
Segments A and C (Cable Stations)	4.6	1.1
TOTAL	$279.6	$67.9

The estimated cost does not include interest during construction, which the Joint Applicants estimate to be approximately $9.3 million.[7] The cost of circuit multiplication equipment is not included since the equipment is not considered a part of the cable system and will be added as needed to serve future demand. About 85 percent of the cost of Segment B of the PacRimEast cable system will be on a fixed price basis, and the remaining 15 percent of the cost will be on a cost-incurred basis. Items such as the submarine cable, the repeaters, the terminal transmission equipment and the high voltage power plant will be furnished on a fixed price basis. Items such as the cable laying, system integration route survey, plowing and burial of the cable, project management, owners' inspection and amounts payable for customs duties and value added taxes will be handled on a cost-incurred basis.

8. As indicated in Appendix 1, the Joint Applicants' collective voting interest in PacRimEast is 24.28%. Appendix 2 shows ownership interests and proportions of capital, operating and maintenance costs of Segment B, and the allocation of capital, operating and maintenance costs for use of Segments A and C. Appendix 3 (Schedule D of the C&MA) lists capacity assignments to the parties. PacRimEast capacity assignments are based on the forecasted demand of each of the Joint Applicants. The assignments contemplate each Joint Applicant's proposed use of circuit multiplication equipment. Both prior and subsequent to the System Ready for Service (RFS) date (first quarter 1993), carriers, including non-owners of PacRimEast, may acquire PacRimEast capacity on an IRU, lease or other mutually agreed upon basis.

9. The Joint Applicants state that PacRimEast is the first digital fiber optic submarine cable directly linking the Hawaii and New Zealand. It is part of an integrated common carrier network designed to meet specific service requirements for additional digital cable facilities in the POR and will provide additional digital connectivity to the HAW-4/TPC-3, G-P-T, TPC-4, H-J-K, Tasman-2 and PacRimWest cable systems.[8] PacRimEast will improve digital cable restoration capabilities via interconnection with Tasman-2 and PacRimWest. It would also provide the capability to utilize digital common carrier cable facilities for restoration of HAW-4/TPC-3 or TPC-4. The Joint Application also states that PacRimEast will enhance service reliability by providing multiple digital transmission paths to minimize the number of circuits affected by a service interruption. The Joint Applicants note that many customers, especially those involved with data transmission, are becoming increasingly sophisticated and insisting upon digital submarine cable back-up for their private networks and other custom services.

10. The Joint Applicants also claim that PacRimEast will satisfy the operational requirements of the Department of Defense (DoD) in the POR by providing additional necessary submarine cable capacity, media and path diversity, and redundancy. The Joint Applicants assert that PacRimEast will benefit the U.S. economy generally and the U.S. submarine cable industry specifically by promoting a leadership role for U.S. industry in lightwave submarine cable system technology, and will promote international comity.

II. DISCUSSION

11. The Joint Applicants seek authority to construct and operate the digital PacRimEast cable system to begin service in 1993 and meet their telecommunications capacity needs and those of their correspondents in the POR during the 1993-2005 time frame. We have reviewed the Joint Application under the public convenience and necessity standard of Section 214 of the Communications Act of 1934, as amended, as well as PAS' petition to deny and the comments and reply comments filed by the State of Hawaii, the Joint Applicants and TRT/FTC. We conclude that implementation of the PacRimEast cable system in 1993 will serve the public interest, and certify that the public convenience and necessity require the construction and operation of PacRimEast as described herein. We grant the Joint Application subject to certain conditions.[9]

A. The Need for the PacRimEast Cable System

12. Section 214 of the Communications Act requires that the Commission make a finding that the public convenience and necessity will be served by authorization of the facilities requested in the Joint Application. The standard we employ is "whether the specific facility chosen and the use to be made of that facility are required by the public convenience and necessity."[10] In making this determination, we traditionally have considered such factors as demand, cost, media and route diversity, restoration, intramodal and intermodal competition, technological innovations and international comity.[11] We will consider these factors here, as well as those issues raised in response to the Joint Application.

1. Demand and Capacity

13. Under the traditional form of demand analysis that we have applied in authorizing the construction and operation of submarine cable systems, we conclude that projected circuit demand, along with other factors, supports the introduction of PacRimEast in 1993 to meet the telecommunications needs of the Joint Applicants and their correspondents in the POR during the 1993-2005 time frame.

14. The State of Hawaii asserts that the Commission should not authorize new facilities for the POR absent a convincing showing on the record that existing facilities are or will be fully, effectively and efficiently utilized and that any proposed new facilities are genuinely needed to meet realistically projected user demand and cost/rate effectiveness. According to the State of Hawaii, the Joint Applicants failed to address entirely the subject of user demand and related cost/rate effectiveness. Should the Commission authorize the proposed PacRimEast cable facilities without such evidence, the State of Hawaii asks that the Commission determine that costs allocated to Hawaiian points will be pooled for ratemaking purposes with costs allocated to other U.S. points, particularly the Mainland. The State of Hawaii also notes that the public interest criteria addressed by the Joint Applicants are

mostly unrelated to consumer effects and there is no demonstration that the proposed facilities can provide services not currently available. Although the Joint Applicants describe capacity as "fully subscribed," the State of Hawaii states that there is no data showing current utilization and traffic on existing submarine cable or satellite facilities, projected utilization by type of facility or the basis for such projections.

15. The Joint Applicants assert that PacRimEast is justified on the basis of user demand and documented by the proprietary demand forecast and Circuit Activation Plan data submitted separately by AT&T and the other Joint Applicants under confidential cover as part of the application. They state that these data, based on current information, support the necessity of having PacRimEast operational in 1993. The Joint Applicants note that data describing usage is already available for all existing Pacific cable and satellite facilities through monthly Circuit Status Reports filed with the Commission.[12] Moreover, they state that user demand is determined not only by the need for raw transmission capacity, but also by such user requirements as digital technology, route and media diversity, digital cable restoration capability, security and cost-effectiveness. However, the State of Hawaii believes that where unique requirements exist, such as demanding service by a specific mode of transmission, the user with special requirements (technological, diversity or security related) should bear the differential in cost for such custom facilities and services.

16. We disagree with the State of Hawaii that there is insufficient information on capacity and demand to evaluate the PacRimEast application. Currently, the U.S. ownership interests in ANZCAN analog cable facilities have been fully utilized and there is no digital cable facility available for service to either Australia or New Zealand. Attachment A to the Joint Application indicates that as of December 31, 1989, the Joint Applicants had activated a total of 2,139 circuits for service between the United States and Australia and New Zealand. Of this total, approximately 65% (1384) were routed via satellite facilities. Since there is no available capacity in existing cable facilities for service between the U.S. and these locations, all growth traffic will have to be routed via satellite facilities.

17. The Joint Applicants have provided their forecasted circuit demand for PacRimEast under requests for confidentiality. We have reviewed the data provided by the Joint Applicants and conclude that PacRimEast is also justified on the basis of demand. The data submitted projects that there will be a significant increase in traffic as well as demand for both satellite and digital cable facilities. In order to accommodate the demand for digital cable facilities between the U.S. and New Zealand and Australia, the Joint Applicants propose to acquire a total of 1717 half-MAUOs in PacRimEast. The Joint Applicants project that by 1993, PacRimEast's first year of service, there will be a need for 581 half-MAUOs or approximately 34% of their total investment in PacRimEast. They project that the demand for digital cable facilities will increase to 969 half-MAUOs by 1997, approximately 56% of their total investment in PacRimEast. Based on these projections, we conclude that the proposed investment by the Joint Applicants in PacRimEast is reasonable. Investment in PacRimEast will: 1) allow growth traffic to be place on cable facilities; 2) allow the Joint Applicants to satisfy the demand for digital cable facilities; and 3) enhance service reliability through increasing digital connectivity with an integrated common carrier network.[13]

18. *Presence of Other Facilities.* In considering the demand for the PacRimEast cable system, the State of Hawaii believes that the Commission should take into account the presence of other facilities, both private and common carrier. In particular, the State of Hawaii cites pending applications for US Sprint's "Hawaii Fiber Optic-1 Cable" and Transnational Telecom, Ltd.'s "Aloha Cable", the recently authorized TPC-4 and PPAC POR cables and the proposed HAW-5 Cable System. The Joint Applicants note that the Commission has held that private cables are not substitutes for other common carrier facilities. With respect to common carrier facilities, the Joint Applicants state that each of the proposed facilities will be considered in an appropriate Section 214 proceeding. The State of Hawaii believes that acceptance of the Joint Applicants' position would encourage "piecemeal" consideration of new facilities without an overview. According to the State of Hawaii, such an approach would lead to excessive investments and duplication of user demand.

19. We disagree with the State of Hawaii's suggestion that other private cable facilities should be taken into consideration in determining whether the PacRimEast cable system is justified. We have previously addressed and rejected this argument in considering applications for new common carrier cable facilities. In those instances, we determined that private cables would compete with, and not supplant, common carrier facilities.[14] Moreover, we do not see the relevance of the State of Hawaii's argument in the context of this application. Even if our policy allowed private cable facilities to be considered in addressing the need for additional common carrier facilities, the facilities cited by the State of Hawaii are incapable of providing service between Hawaii and either New Zealand or Australia. The Aloha Cable connects Hawaii to the U.S. Mainland. The PPAC Cable, also known as NPC, provides a direct connection between the U.S. Mainland and Japan.

20. With respect to other common carrier cables, we note that the need for additional facilities is considered in the context of a Section 214 application proceeding. In this proceeding we have considered other common carrier facilities in determining that there is a need for the PacRimEast cable system. Moreover, none of the common carrier cable referenced by the State of Hawaii has the capability to provide service between Hawaii and Australia and New Zealand. The Fiber Optic-1 cable connects the U.S. Mainland and Hawaii, while the TPC-4 cable system provides direct service between the U.S. Mainland and Japan.

21. *The Effect of Price Caps Regulation.* In addition to the showing of demand, current competitive conditions and regulatory approaches provide the Joint Applicants with the incentive to make rational economic decisions and not engage in unnecessary construction of facilities.[15] In light of these factors, we noted in authorizing the construction of the TPC-4 cable system that we are now able to give the Joint Applicants wider latitude in determining what facilities to construct and when to place such facilities in service.[16]

22. The State of Hawaii questions the effectiveness of price caps regulation in preventing unnecessary investment since it is only applicable to AT&T[17] and because it believes that the Joint Applicants have every incentive to

invest in new submarine cable facilities before the next review of price-capped rates or rate-of-return regulated rates. By investing now, the State of Hawaii asserts that AT&T can have these costs and investments added to its investment and cost base to justify the next generation of price caps. Thus, it views price caps regulation as having the same characteristics as rate-of-return regulation. Further, the State of Hawaii alleges that AT&T's recently capped international rates were never appropriately justified or examined on the basis of a Commission prescribed rate of return.

23. In their Reply Comments, the Joint Applicants view the State of Hawaii's suggestion that a carrier would purchase facilities for which it has no need and pass the burden on to ratepayers as ignoring the present economic reality of investment in a cable system. They note that if a carrier purchases an unneeded facility in today's competitive market, it makes an investment upon which it can earn no return. Moreover, they state that the "price caps" system of regulating AT&T provides an overwhelming disincentive to invest in unneeded facilities for under the price cap system, the risk of an investment, such as PacRimEast, is upon the investing carrier's shareholders and not upon its ratepayers

24. We disagree with the State of Hawaii's view of price caps regulation. In our *TPC-4 Decision* we stated that the price caps system of regulation is a disincentive for carriers to engage in the construction of unnecessary facilities since the burden of such investment would fall on stockholders and not ratepayers.[18] The same rationale is equally applicable here. AT&T is effectively restrained under price caps regulation from imprudent, unnecessary investment. The State of Hawaii's contention that price caps regulation provides AT&T with incentive to invest in new submarine cable facilities before the next price cap review is based on the faulty premise that such investment would be "rubber stamped" without appropriate review.

25. There is also no basis for questioning the efficacy of price caps regulation because it is not applicable to all of the Joint Applicants. We note that, with the exception of HTC, the remaining co-owners of the PacRimEast cable system are classified as non-dominant, which means that they do not possess market power. Therefore, any investment in unnecessary facilities would require them to be able to raise rates to recoup such investment. As a result, any non-dominant carrier that raises rates above those set by the marketplace to recover imprudent investments risks the loss of potential customers.[19] Finally, we note that this proceeding is not the proper vehicle for considering the State of Hawaii's suggestion that AT&T's recently capped international rates were never properly justified on the basis of a Commission prescribed rate of return.

26. The State of Hawaii also asserts that international rates are not yet wholly integrated with those of the rest of the United States and, since it has not had access to the Joint Applicants' demand forecasts, it fears that Hawaii may suffer the effect of disproportionate cost distribution from these facilities. The Joint Applicants assert that the State of Hawaii's comments on ratemaking are inappropriate in a Section 214 authorization. They suggest that if the State of Hawaii feels special regulatory mechanisms are appropriate for Hawaii, it should pursue this through a rate proceeding. We agree. The State of Hawaii has not demonstrated that either current international rates are biased against Hawaii or that future rates may be biased because of unnecessary investment. The State of Hawaii's concern in this regard is based on its belief that the PacRimEast cable system is not justified based on demand. As noted above, we believe that the State of Hawaii's concerns regarding unnecessary investment in the PacRimEast cable system are unfounded in light of the demonstrated demand for the cable system, the existence of a competitive marketplace and current regulatory approaches. Any further concerns regarding rate integration are best addressed in the context of a rate proceeding.[20]

2. Cost Analysis

27. The Joint Application estimates the total costs of PacRimEast to be $279.6 million, with the Joint Applicants' share to be $67.9 million. In addition, it estimates that interest during construction will be $9.3 million. The State of Hawaii asserts that the Joint Applicants' support for projected costs is conclusory and notes that the projections are not sufficiently detailed to permit acceptance by the Commission. According to the State of Hawaii, there is neither a showing with respect to the basis for the overall cost, nor a showing of fees, profits or reserves for contingencies. The Joint Applicants state that their cost support information is consistent with their best knowledge and that there is no reason for them to go beyond the customary level of detail, particularly in light of the Commission's recent statement that detailed analysis of facility costs previously conducted is no longer necessary in the present price caps environment.[21]

28. We find the cost data provided by the Joint Applicants sufficient to support their application to construct PacRimEast. The Joint Application provides the total cost of PacRimEast, the Joint Applicants' share, the subsegment costs, the Joint Applicants' share of the subsegment costs, the percentages of fixed and cost-incurred costs, and the cost of a 64 Kbit/s half-circuit. The cost data submitted is similar in type to cost data previously submitted and accepted in other cable construction applications. In those cases, the cost data was found to be sufficient, and nothing has changed in the interim to warrant the submission of more detailed cost information.

29. We also note that the Joint Applicants' investment in PacRimEast will provide customers with the advantages of digital technology and increased capacity at significantly lower costs compared to existing analog cable facilities. For example, a 4 kHz half-circuit in the analog ANZCAN cable between Hawaii and New Zealand cost $112,971, and $90,857 between Hawaii and Australia.[22] In contrast, the cost for a 64 Kbit/s half-circuit in PacRimEast between Hawaii and New Zealand is $39,500, approximately 35% of the cost of an ANZCAN analog 4 kHz half-circuit. Similarly, the combined cost for a 64 Kbit/s half-circuit in PacRimEast and the Tasman-2 cable between Hawaii and Australia is $47,862, approximately 53% of the cost of an analog 4 kHz half-circuit in ANZCAN.[23]

3. Quality of Service

30. *Media and Route Diversity*. We previously have found that increasing media and route diversity to strengthen service reliability is of decisional significance in our public interest determination to authorize the construction of transoceanic facilities.[24] Media diversity enhances service reliability through the use of more than one transmission medium, satellite or cable, to carry a

correspondent's traffic. As a result, an increase in media diversity protects against the systemic failure of one medium. Route, or path, diversity enhances service reliability by increasing the number of independent routes that carry traffic to a given location. It is closely related to the ability to restore circuits in case of a facility failure. As a rule, the more independent routes serving a given location, the greater the ability to restore one that fails. Thus, an increase in route or path diversity is the natural consequence of the introduction of another facility into a region.

31. We conclude that the introduction of PacRimEast as proposed will enhance both media and route diversity. PacRimEast will enhance route diversity by adding another independent route between Hawaii and New Zealand and Hawaii and Australia via interconnection with Tasman-2. Through interconnection with HAW-5, an independent route is provided between the U.S. Mainland and New Zealand and Australia. Moreover, route or path diversity will be enhanced between the United States and Japan and Southeast Asia, in that PacRimEast through interconnection with Tasman-2, PacRimWest, HAW-5 and connecting cable systems will provide a separate transpacific route south of the HAW-4/TPC-3 and TPC-4 cable systems. Service reliability would be improved since the number of circuits affected by a service interruption on a particular route or routes would be minimized and the ability to restore the failed facility via another digital cable facility would be enhanced.

32. With respect to media diversity, as of December 31, 1989 the Joint Applicants were providing a total of 2139 circuits, consisting of 755 submarine cable and 1384 satellite circuits between the U.S. and Australia and New Zealand. Thus, a failure of satellite facilities could significantly disrupt services in the region. While the Commission has never specified what a preferable cable/satellite ratio would be, the addition of PacRimEast capacity would minimize the impact of a failure of satellite facilities in the region.

33. *Restoration*. Restoration pertains to the ability to maintain service in the event of a facility outage. The Joint Applicants state that PacRimEast will improve digital cable restoration capabilities via interconnection with the Tasman-2 and PacRimWest cable systems, which would provide the capability to utilize digital common carrier cable facilities for restoration of HAW-4/TPC-3 or TPC-4. In addition, the Joint Applicants note that many customers, especially those requiring data communications, are becoming increasingly sophisticated and are insisting on digital cable backup for their private networks and other custom services.

34. We find that PacRimEast will provide restoration capabilities that currently are unavailable by allowing for digital cable restoration via a self-healing (self-restoration) design. Restoration of HAW-4/TPC-3 currently is occurring through the use of INTELSAT capacity. Although the Commission has previously recognized that satellite capacity provides a satisfactory restoration alternative for cable, we also have recognized that absolute reliance on satellite facilities to meet restoration needs and increased demand may not be in the best interests of users that may have specific communications requirements that may best be accommodated by fiber optic cable facilities.[25] In light of these factors, we conclude that it is reasonable for the Joint Applicants to seek an alternative cable route that would allow for increased digital connectivity in the POR to increase restoration options for digital cable facilities.

4. Technological Innovations

35. PacRimEast will be the first digital fiber optic submarine cable directly linking Hawaii and New Zealand. In addition, PacRimEast, through interconnection with the Tasman-2 cable, will provide the first digital fiber optic capability between the U.S. and Australia. With the increasing demand for digital cable facilities, we find that introduction of digital fiber optic technology between the U.S. and New Zealand and Australia justifies the Joint Applicants' participation in PacRimEast.[26] The introduction of new technology is compelling since there are no cable systems serving these locations with available capacity.

5. Competition Considerations

36. *Intermodal and Intramodal Competition*. We previously have recognized that enhancing both intermodal and intramodal competition can be expected to spur providers of both international satellite and cable services to keep their services innovative and their prices low.[27] We find that introduction of PacRimEast will enhance intramodal competition in the POR and encourage both private and common carrier cable operators to innovate and price their offerings in a manner that is calculated to attract and retain customers. We also find that introduction of PacRimEast will increase intermodal competition with INTELSAT and potential separate satellite system providers and thereby spur existing providers of both cable and satellite capacity to respond competitively. Such competition will give service providers and other users greater choice in selecting facilities and thus will enable them to maintain, or improve and enhance, the economy and efficiency of their operations. The opportunity to choose among facilities further allows service providers to be more responsive to customer needs in terms of price, service quality, and service availability.

37. *Competitive Procurement*. Although the State of Hawaii acknowledges that there may not be a reason to impose a particular procurement scheme on the Joint Applicants, it states that the Joint Applicants have failed to disclose the procurement practices they intend to use. In particular, the State of Hawaii asserts that the Joint Application does not account for the range of competitive costs suggested or proposed by alternate suppliers not among the Joint Applicants and makes no provision for the costs associated with awarding prime and subcontracts. AT&T and HTC note that PacRimEast procurement decisions are not matters on which the Joint Applicants can, by themselves, change because 17 of the 23 PacRimEast owners are carriers from outside the United States. They assert that contracts for procurement of the system will be awarded to those firms in the market best able to meet the requirements of PacRimEast in a cost-effective matter and the PacRimEast owners must have the flexibility in their day-to-day installation operations to secure quality products and services on a timely basis. In this regard, the Joint Applicants reference the procurement of the TPC-4 cable system in which the Commission did not specify a particular method for the selection of subcontractors.

38. We find no basis to question the procurement practices of the Joint Applicants. The Joint Applicants state that qualified suppliers will be afforded a reasonable op-

portunity to participate in the procurement of PacRimEast. The procurement of PacRimEast is therefore consistent with our goal to assure U.S. opportunity to participate in procurement and supply processes.[28] As the Joint Applicants note, the U.S.-supplied portions of HAW-4/TPC-3 used more than 65 subcontractors from 22 states. The Joint Applicants also anticipate that a multitude of subcontractors will participate in the construction or provision of materials for any portion of PacRimEast that will be supplied by AT&T.[29] Moreover, under price caps regulation, AT&T has the incentive to subcontract with those suppliers that offer a competitive price. Given the existing incentives to subcontract in a cost-effective manner, we do not believe it is necessary to condition the grant of PacRimEast on further assurances of competitive procurement practices.

6. International Comity

39. Our decisions authorizing the construction and operation of transoceanic submarine cable systems historically have recognized that correspondent acceptance is an important public interest factor.[30] Twenty-three telecommunications entities and carriers, including those from 14 foreign countries, have agreed that the PacRimEast system design and 1993 service date will meet the service needs of their customers. Thus, we conclude that PacRimEast will promote international comity.

B. Other Issues

40. *The Need for A Planning Proceeding.* The State of Hawaii is concerned that the Joint Applicants fail to address or acknowledge previous Commission planning or authorization dockets for the POR.[31] Although the State of Hawaii concedes that the Commission can act without undertaking planning proceedings, it believes that the Commission has to continue to view applications in a broader planning perspective to ensure that ratepayers are not burdened with unnecessary facility investments. Of particular concern to the State of Hawaii is the fact that the *POR Planning* proceeding, which covered the 1995 time frame, did not contemplate the proposed cable or additional cable facilities.

41. The Joint Applicants state that there is no need for them to address the *POR Planning* proceeding because the Commission has specifically determined that separate facilities planning dockets are not required as a matter of law and are not necessary as a matter of policy in the current competitive environment.[32] Further, they note that all of the facilities considered in the *POR Planning* proceeding have either been placed into operation or are in the final stages of construction, and the specific facility configuration considered in the *POR Planning* proceeding in 1985 is no longer at issue.

42. In authorizing the construction and operation of the TPC-4 Cable System, we addressed the issue of whether a planning process is required before authorization of new POR facilities. In the *TPC-4 Decision* we found that there is no requirement in the Communications Act that this Commission must undertake a facilities planning process before it considers a Section 214 application to construct and operate a submarine cable system. Further, we stated that Section 214 of the Act provides ample authority for Commission consideration of those factors that bear on a public interest, convenience and necessity determination.[33] Citing several recent developments, we concluded that we could now move away from a comprehensive planning process prior to authorizing the introduction of new facilities in the POR. First, we noted that the introduction of price caps regulation of AT&T significantly protects AT&T ratepayers from the results of potentially imprudent facilities investments. Second, we noted that the elimination of circuit distribution guidelines in favor of agreements between Comsat and AT&T and other carriers on the distribution of traffic between cable and satellite facilities and the introduction of competing private cable and satellite systems provide incentives for efficient investments in transmission facilities. In light of these developments, we found it unnecessary to engage in a facilities planning process before acting on the Section 214 application to construct and operate the TPC-4 cable system. Nothing has changed in the interim, and the State of Hawaii has not pointed to any compelling reasons which would justify reinstating the planning process. Accordingly, we hereby reaffirm our previous findings on this subject.

43. *PAS Petition to Deny.* PAS does not oppose a grant of the PacRimEast cable system. Rather, PAS' petition to deny is directed solely to TRT/FTC's ownership interest in the cable and the relationship of TRT/FTC to France Telecom which has refused to engage in two-way service via PAS' separate satellite system. Although PAS has secured INTELSAT Article XIV(d) consultations for all of its services with many countries, it notes that France has been a prominent exception. According to PAS, despite clear customer interest in both data and video transmissions to and from France, France Telecom has consistently refused to consider any INTELSAT Article XIV(d) consultations for services beyond one-way video (U.S. to France). Thus, PAS argues, the French telecommunications market remains effectively closed to U.S. separate satellite systems. Since France Telecom holds a 14.9 percent interest in TRT/FTC through various subsidiaries and holding companies, PAS asserts that TRT/FTC should not be authorized to expand its operations in the United States during the pendency of its petition for reconsideration of the Common Carrier Bureau's *FTCC Ruling*.[34] It states that the Commission has authority to evaluate market access issues in acting on Section 214 applications such as the instant application involving TRT/FTC.

44. PAS' argument on this point is not new. In its *FTCC Ruling*, the Bureau concluded that FTCC (now TRT/FTC) should be classified as non-dominant in its provision of all international services to all points,[35] except that it would continue to be classified as dominant in its provision of all common carrier services with France. The *FTCC Ruling* conditioned the grant of non-dominant status to all points except France on the amendment of FTCC's existing Section 214 authorization for switched voice services to France to include certain standards applicable to the access filings of dominant carriers. The *FTCC Ruling* also concluded that TRT should not be treated as a dominant carrier either generally or for the French market. PAS sought reconsideration of the *FTCC* ruling. During the pendency of its petition for reconsideration, PAS has filed several petitions to deny applications filed by TRT/FTC for the acquisition of facilities to provide its authorized services to various countries. In each instance, the Bureau found that PAS failed to explain why TRT/FTC should be considered to possess market power with countries other than France. In the context of this proceeding, PAS requests that the subject application be

denied with regard to participation by TRT/FTC or, at a minimum, held in abeyance pending final resolution of its petition for reconsideration of the *FTCC Ruling*.

45. On June 1, 1990, the Bureau released its *FTCC Reconsideration Order*, which affirmed the *FTCC Ruling* in all respects.[36] Specifically, the Bureau affirmed its earlier determination that FTCC does not fall strictly within the definition of a foreign-owned carrier. The Bureau also affirmed its finding that PAS has not provided any evidence to demonstrate that FTCC should be classified as a foreign-owned and, consequently, dominant carrier in its provision of international common carrier services solely because of the presence of an French Cables et Radio (FCR) representative director on the board of the holding company, ICH. PAS did not file an application for review of the *FTCC Reconsideration Order*; accordingly, its request for deferral pending resolution of that proceeding is moot. Even if TRT/FTC had been found to be dominant for services to countries other than France, PAS has not explained why, in this case, TRT/FTC's participation in PacRimEast should be denied. As the Bureau noted in the *FTCC Reconsideration Order*, while PAS may be correct that there has been little or no progress with France on issues of concern to PAS, there has been progress with France on other issues, such as lower accounting rates with U.S. carriers, which has continued. Accordingly, we deny PAS' request that we deny or hold in abeyance that portion of the application which relates to TRT/FTC's participation in PacRimEast.

III. CONCLUSION AND ORDERING CLAUSES

46. The instant application to construct and operate the PacRimEast optical fiber cable system will serve the public convenience and necessity. The proposed system is required to satisfy the service preferences and needs of users. Currently, the Joint Applicants have exhausted all available capacity in analog cable facilities serving Australia and New Zealand. Because of technological innovation and PacRimEast's direct route to New Zealand, the half-circuit cost for a 64 Kbit/s half-circuit in PacRimEast is approximately one-third of the cost for a 4 kHz half-circuit in the ANZCAN analog cable between Hawaii and New Zealand. The PacRimEast cable system will provide service quality benefits in terms of increased route and media diversity and restoration capability, and will enhance intermodal and intramodal competition. The proposed system also meets international comity concerns.

47. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorizations will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[37] Consequently, no environmental assessment is required to be submitted with this Joint Application by Section 1.1311 of the Commission's Rules.

48. Upon consideration of the Joint Application, we find that the present and future public interest, convenience and necessity require the construction and operation of the PacRimEast cable system as described herein.

49. Accordingly, IT IS ORDERED that the Joint Application, File No. I-T-C-90-072, of the Joint Applicants (AT&T, HTC, MCII, TRT/FTC, US Sprint and Worldcom)[38] is GRANTED, subject to the following terms, conditions and limitations, and the Joint Applicants are authorized to:

(a) construct and operate the PacRimEast Cable System as proposed herein;

(b) acquire and activate capacity in the PacRimEast Cable System, on an ownership basis, in accordance with the interests indicated in the MAUOs specified in Appendix 3;

(c) acquire capacity, by lease, in such connecting facilities as may be required to extend capacity in the PacRimEast Cable System;

(d) utilize digital circuit multiplication systems (DCMS) equipment to derive additional voice paths from the circuits (MAUOs) authorized herein in accordance with the appropriate Commission authorizations; and

(e) activate and operate capacity in the PacRimEast Cable System and aforementioned extension facilities for the provision of the Joint Applicants' authorized telecommunications services.

50. IT IS FURTHER ORDERED that when a given Joint Applicant seeks to acquire or transfer an ownership or IRU interest in the PacRimEast capacity, the reimbursement it receives shall be on the basis of depreciated original cost (or the pro-rated accumulated cost of such circuit if the systems are not then operational) or in conformance with such policy as the Commission shall develop in the future regarding the price at which IRUs will be made available.

51. IT IS FURTHER ORDERED that the Joint Applicants shall make available half-interests in the PacRimEast capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity.

52. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate U.S. carriers' interests in capacity herein authorized, as the public interest may require to accommodate additional carriers or otherwise, with, where required, the concurrence of the foreign administration or carriers concerned, and, further, jurisdiction is retained by the Commission over all matters relating to the Joint Applicants' ownership, management, maintenance, and operation of the cable system as authorized herein, to assure the most efficient use not only of this cable system, but of all means of communications between the U.S. and Pacific Ocean Region.

53. IT IS FURTHER ORDERED that the Commission retains jurisdiction to review the DCMS, multiplexing, and interworking arrangements and attribution of the costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

54. IT IS FURTHER ORDERED that no Joint Applicant that is deemed a dominant carrier pursuant to the Commission's decision in CC Docket No. 85-107[39] shall dispose of any interest in any PacRimEast capacity it is authorized to acquire in any way without prior authorization by the Commission.

55. IT IS FURTHER ORDERED that the Joint Applicants shall include PacRimEast facility use in the monthly Circuit Status Reports filed pursuant to the

Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceding month.

56. IT IS FURTHER ORDERED that PAS' Petition to Deny IS DENIED.

57. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to the Joint Applicants herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39), covering the subject submarine cable, and shall become effective upon the acceptance of the aforementioned license by all such parties.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] By letter dated June 20, 1990 the Commission approved the *pro forma* transfer of control and assignment of licenses from FTCC to TRT/FTC. The transaction was consummated on June 29, 1990, which resulted in TRT/FTC as the sole surviving carrier. *See* File Nos. CSG-90-027-(5)AL and I-T-C-90-067-TC.

[2] Although AT&T did not indicate that its reply was filed on behalf of the Joint Applicants, the pleading clearly represents their position. Thus, all references herein to the Joint Applicants' position should be construed as including the views expressed in the Joint Application and AT&T's reply.

[3] All applicants initially may not be certified to serve directly all territories that the facilities covered by the Joint Application are capable of serving. Each individual applicant proposing extensions of its services into such territories by means of PacRimEast will seek such appropriate authorization as may be required when it proposes to activate the facilities.

[4] Although the supply contracts for PacRimEast have not been awarded by the PacRimEast Procurement Group, it is expected that AT&T will be awarded a contract to supply a portion of Segment B of the cable system. To the extent that AT&T participates in the construction of PacRimEast, it is expected that a multitude of U.S. subcontractors will participate in the construction or provision of materials for the AT&T portion of the project.

[5] A MAUO is the Minimum Assignable Unit of Ownership and provides and equivalent digital channel operating at 64,000 bits per second and an additional 9,684.656 bits per second required for multiplexing.

[6] The PacRimEast cable system will be buried on the continental shelves off the coasts of Hawaii and New Zealand, to protect the cable from damage due to fishing and trawler activities. The cable also will be armored and fish bite protected where required.

[7] The Joint Applicants estimate the original capital cost of 64 kbits/s half-circuit (half-MAUO) in PacRimEast will be $39,500. The cost per half-MAUO will further decrease as the Reserve Capacity is utilized by increasing the Notional Capacity. The Notional Capacity is the amount of the cable's capacity which is currently subscribed to. When the Notional Capacity reaches design capacity, the cost per half-MAUO will be approximately $18,500.

[8] *See* Appendix 4. Today, we also grant the Joint Applicants' separate requests to construct and operate the HAW-5 and PacRimWest cable systems. The Tasman-2 cable will be considered at a later date.

[9] In a separate decision, we also grant the Joint Applicants' request for a cable landing license in File No. S-C-L-90-003 pursuant to the Cable Landing License Act.

[10] *AT & T et al., (TAT-7 Order)*, 73 FCC 2d 248, 256 (1979).

[11] *See, e.g., AT & T et al. (TAT-9 Order)*, 4 FCC Rcd 1129, 1131 (Com. Car. Bur. 1988). *See also Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs during the Period 1981 - 1985 (POR Planning)*, 102 FCC 2d 353, 355 (1985).

[12] The State of Hawaii disputes this point, noting that the Circuit Status Reports do not show usage or traffic carried over the subject facilities, but instead the quantity of circuits held and/or owned by each of the carriers without regard to use.

[13] PacRimEast is designed as a part of an integrated common carrier network to meet specific service requirements for additional digital cable facilities in the POR, to provide additional digital connectivity with the HAW-4/TPC-3, G-P-T, TPC-4, H-J-K, Tasman-2 and PacRimWest cable systems. *See* Appendix 4.

[14] *See Tel-Optik Limited (Private Submarine Cable)*, 100 FCC 2d 1033, 1049 (1985); *Pacific Telecom Cable, Inc.*, 2 FCC Rcd 2686, 2690, n. 15 (Com. Car. Bur 1987); *clarified*, 4 FCC Rcd 4454, 4455 (Comm. Car. Bur. 1989); *Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Meet North Atlantic Needs During the 1991-2000 Period*, 3 FCC Rcd 3979, 3989-90 (1988) *(North Atlantic Facilities Planning)*.

[15] *See Policy and Rules Concerning Rates for Dominant Carriers (Price Caps Order)*, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989).

[16] *See American Telephone & Telegraph, et. al.*, 4 FCC Rcd 8042, 8046 (1989) *(TPC-4 Decision)*.

[17] Price caps regulation also applies to HTC. *See Policy and Rules for Dominant Carriers*, CC Docket No. 87-313, para. 255 (FCC 90-314, released Oct. 4, 1990).

[18] *Id.* at 8045.

[19] *See International Competitive Carrier Policies*, 102 FCC 2d 812, 829 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986); *US Sprint Communications Company Limited Partnership*, 4 FCC Rcd 6279, 6284 (Com. Car. Bur. 1989).

[20] In 1985, the Commission issued a Notice of Proposed Rule Making that terminated the inquiry into the compatibility of rate integration and competition for interstate communications between the contiguous states and Hawaii. At that time, the State of Hawaii also asserted that the Hawaii should not be disadvantaged by being singled out for a special rate structure. The State of Hawaii added that the rate integration policy, which it supported, had substantially achieved its objective of lowering rates between the noncontiguous points and the contiguous states. *See Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers*, 50 Fed. Reg 41714 (October 15, 1985).

[21] *See TPC-4 Decision*, 4 FCC Rcd at 8046.

[22] These costs are in 1984 dollars.

[23] The estimated cost for a 64 Kbit/s half-circuit in Tasman-2 is $8,362. As the Notional Capacity of PacRimEast approaches the design capacity, the cost for a 64 Kbit/s half-circuit between Hawaii and New Zealand would decrease to $18,500, approximately 16% of the cost of an ANZCAN analog 4 kHz half-circuit. Similarly, the combined cost for a 64 Kbit/s half-circuit

in PacRimEast and the Tasman-2 cable between Hawaii and Australia would decrease to $26,862, approximately 30% of the cost of an analog 4 kHz half-circuit in ANZCAN.

[24] *See North Atlantic Facilities Planning*, 3 FCC Rcd at 3986; *All America Cable and Radio Inc., et. al.*, 67 FCC 2d 451, 469 (1978).

[25] *North Atlantic Facilities Planning*, 3 FCC Rcd at 3987.

[26] A portion of PacRimEast will employ AT&T's latest 1.55 micron laser and 565 Mbit/s technology. The 1.55 micron technology reduces the number of repeaters that would have been required with 1.3 micron laser technology. The reduced number of repeaters, in turn, results in cost savings.

[27] *North Atlantic Facilities Planning*, 3 FCC Rcd at 3989.

[28] *See Pacific Telecom Cable, Inc.*, 4 FCC Rcd 8061, 8066 (1989).

[29] While we rely solely on the record set forth above, we note that AT&T was awarded contracts in the sum of $191 million to construct one-half of TPC-4. *See FCC Press Release*, October 16, 1989.

[30] *See North Atlantic Facilities Planning*, 3 FCC Rcd at 3989.

[31] *See Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs during the Period 1981-1985 (POR Planning)*, 102 FCC 2d 353 (1985).

[32] *See TPC-4 Decision*, 4 FCC Rcd at 8045.

[33] *Id.*

[34] *FTC Communications, Inc.*, 4 FCC Rcd 5633 (Com. Car. Bur. 1989) (*FTCC Ruling*); *recon. denied*, 5 FCC Rcd 3323 (Com. Car. Bur. 1990) (*FTCC Reconsideration Order*).

[35] *See supra* footnote 1.

[36] *FTC Communications, Inc.*, 5 FCC Rcd 3323 (Com. Car. Bur. 1990).

[37] *See* Joint Application at p. 20.

[38] *See supra* n. 1.

[39] *See International Competitive Carrier*, 102 FCC 2d at 822, 832.

APPENDIX 1

SCHEDULE B

VOTING INTERESTS

IN THE CABLE SYSTEM

PacRim East

PARTIES	VOTING INTEREST PERCENTAGE
AT&T	14.4231
BT PLC (UK)	5.0905
BTE (Ireland)	0.9191
CWHK (Hong Kong)	1.6968
DBP (Germany)	1.9514
FT (France)	0.5373
FTCC	0.4242
HTC	0.5232
IDC (Japan)	0.8484
ITALCABLE (Italy)	0.4242
ITDC (Taiwan)	0.4242
KDD (Japan)	3.3937
MCII	5.0905
MCL (UK)	3.8179
NPTT (Netherlands)	0.6363
OTC (Australia)	43.1844
PHILCOM (Philippines)	0.2121
PLDT (Philippines)	0.2121
TCNZ (New Zealand)	8.9508
TELEFONICA (Spain)	0.4525
TELEGLOBE (Canada)	2.9695
TRT	0.8484
US SPRINT	2.5452
WORLDCOM	0.4242
TOTAL:	100.0000

APPENDIX 2

SCHEDULE C

OWNERSHIP INTERESTS AND ALLOCATION OF CAPITAL, OPERATING AND MAINTENANCE COSTS OF SEGMENT B; AND PROPORTIONS OF CAPITAL, OPERATING AND MAINTENANCE COSTS FOR USE OF SEGMENTS A AND C

PacRim East

PARTIES	VOTING INTEREST PERCENTAGE
AT&T	14.4231
BT PLC	5.0905
BTE	0.9191
CWHK	1.6968
DBP	1.9514
FT	0.5373
FTCC	0.4242
HTC	0.5232
IDC	0.8484
ITALCABLE	0.4242
ITDC	0.4242
KDD	3.3937
MCII	5.0905
MCL	3.8179
NPTT	0.6363
OTC	43.1844
PHILCOM	0.2121
PLDT	0.2121
TCNZ	8.9508
TELEFONICA	0.4525
TELEGLOBE	2.9695
TRT	0.8484
US SPRINT	2.5452
WORLDCOM	0.4242
TOTAL:	100.0000

APPENDIX 3
SCHEDULE D

ASSIGNMENT OF CAPACITY IN SEGMENT B IN HALF INTERESTS IN MAUOs

PacRim East

1. Jointly Assigned Capacity (Half Interests in MAUOs)

PARTIES	OTC	TCNZ	SUBTOTAL
AT&T	840	180	1020
BT PLC	300	60	360
BTE	60	5	65
CWHK	120	0	120
DBP	120	18	138
FT	30	8	38
FTCC	30	0	30
HTC	22	15	37
IDC	60	0	60
ITALCABLE	30	0	30
ITDC	30	0	30
KDD	210	30	240
MCII	270	90	360
MCL	240	30	270
NPTT	30	15	45
PHILCOM	15	0	15
PLDT	15	0	15
TELEFONICA	30	2	32
TELEGLOBE	150	60	210
TRT	60	0	60
US SPRINT	120	60	180
WORLDCOM	30	0	30
SUBTOTAL	2812	573	

2. Wholly Assigned Capacity (Half Interests in MAUOs)

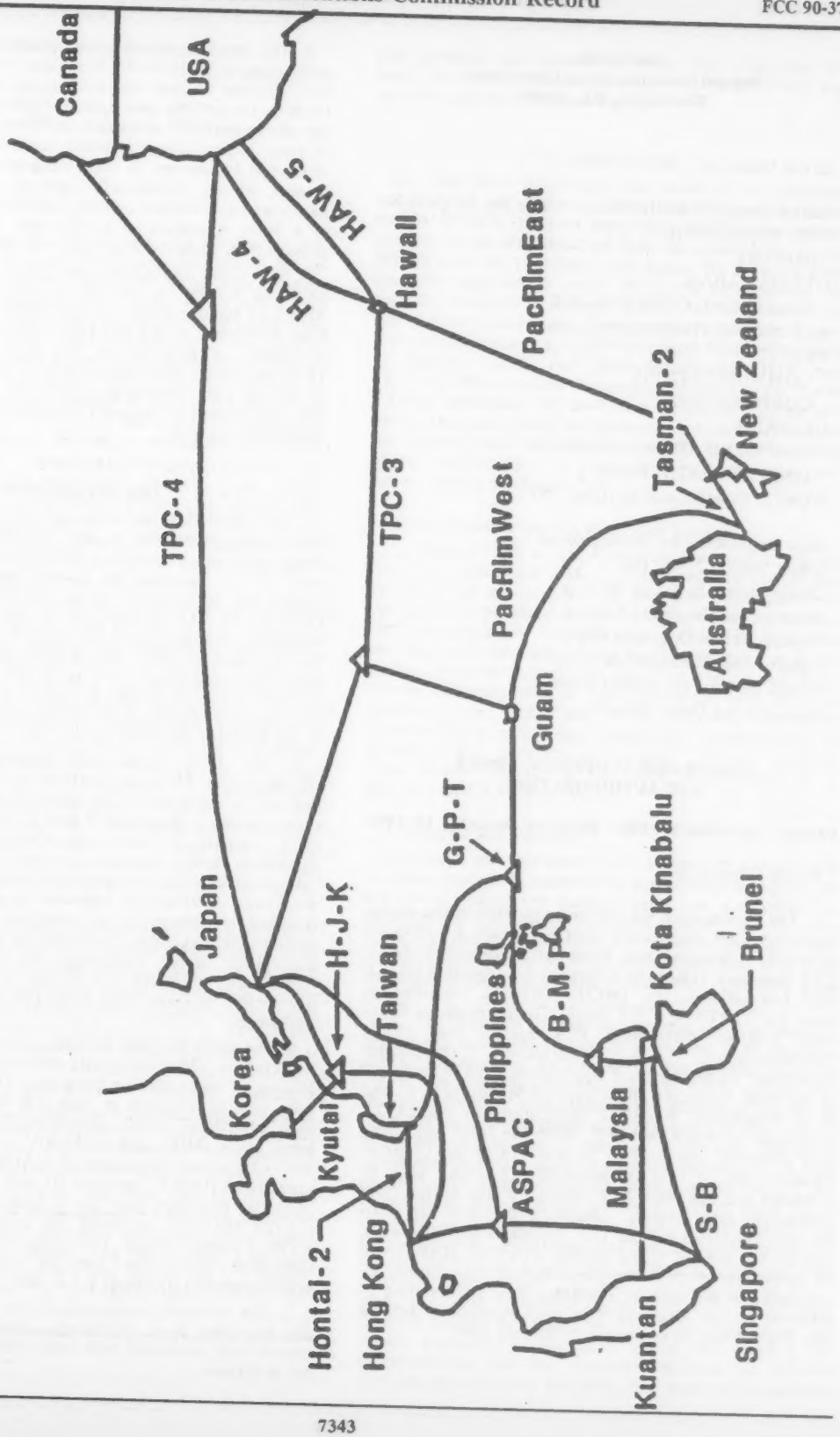
PARTIES	
OTC	242
TCNZ	60
SUBTOTAL	302

Summary

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	TOTAL ASSIGNED PER PARTY
AT&T	1020	0	1020
BT PLC	360	0	360
BTE	65	0	65
CWHK	120	0	120
DBP	138	0	138
FT	38	0	38
FTCC	30	0	30
HTC	37	0	37
IDC	60	0	60
ITALCABLE	30	0	30
ITDC	30	0	30
KDD	240	0	240
MCII	360	0	360
MCL	270	0	270
NPTT	45	0	45
OTC	2812	242	3054
PHILCOM	15	0	15
PLDT	15	0	15
TCNZ	573	60	633
TELEFONICA	32	0	32
TELEGLOBE	210	0	210
TRT	60	0	60
US SPRINT	180	0	180
WORLDCOM	30	0	30
TOTAL	6770	302	7072

GRAND TOTAL (Half Interests in MAUOs)	7072

PACIFIC REGION
INTEGRATED COMMON CARRIER CABLE NETWORK



Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
GTE HAWAIIAN TELEPHONE COMPANY, INC.
MCI INTERNATIONAL, INC.
TRT/FTC COMMUNICATIONS CORPORATION
US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP
WORLD COMMUNICATIONS, INC.

File No. I-T-C-90-081

Joint Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable System Between the United States Mainland and Oahu, Hawaii

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: November 8, 1990; Released: December 10, 1990

By the Commission:

1. The Commission has under consideration the above-captioned Joint Application filed on March 30, 1990, by American Telephone and Telegraph Company (AT&T), GTE Hawaiian Telephone Company Incorporated (HTC), MCI International, Inc. (MCII), TRT/FTC Communications, Inc. (TRT/FTC),[1] US Sprint Communications Company Limited Partnership (US Sprint) and World Communications, Inc. (Worldcom) (hereinafter collectively called the Joint Applicants). AT&T, on behalf of the Joint Applicants, filed updated Schedules B, C, and D to Attachment B of the application on August 17, September 14, and October 2, 1990. The Joint Applicants seek authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214, to construct and operate a high capacity digital optical fiber submarine cable system, extending between San Luis Obispo, California on the U.S. Mainland and Keawaula, Hawaii, the HAW-5 Cable System (HAW-5). HAW-5 will be jointly owned by twenty-three telecommunications administrations and carriers, including those representing 14 different foreign locations. The Joint Applicants propose that HAW-5 will be in service in January 1993.

2. The Joint Applicants also seek authority to: (1) acquire capacity in HAW-5; (2) acquire by lease such extension facilities as may be required to extend capacity in HAW-5; (3) activate and operate capacity in HAW-5 and the aforementioned extension facilities for the provision of their respectively authorized telecommunications services; and (4) convey to their correspondents or to non-owners, on an indefeasible right of user (IRU) basis, half-interests in certain capacity currently wholly assigned to a Joint Applicant to permit said IRU recipients to provide their authorized services over HAW-5.

3. The Joint Application was placed on public notice on April 4, 1990. A petition to deny was filed by Pan American Satellite (PAS), and comments were filed by the State of Hawaii. AT&T and HTC, individually, filed reply comments in response to the State of Hawaii, and TRT/FTC filed a letter opposing PAS' petition.[2] The State of Hawaii filed responsive comments to AT&T's reply. The Department of Defense (DoD) also filed comments in support of HAW-5.

I. THE APPLICATION

4. The Joint Applicants will use HAW-5 to supplement their existing facilities in the provision of service that each applicant presently is furnishing or subsequently may furnish between the United States Mainland and Hawaii and international points. [3] HAW-5 capacity will be extended by suitable facilities to the borders of other countries participating in the HAW-5 cable system or to the terminals of other international communications systems, including other cable terminals and satellite earth stations.[4] Also, in Hawaii the HAW-5 Cable System will connect with suitable facilities which will provide access to the domestic networks of that state.

5. The Construction and Maintenance Agreement (C&MA) for HAW-5 was initialed on March 28, 1990. As defined in the C&MA, the cable system will consist of three segments. Segments A and C are, respectively, the cable stations at San Luis Obispo, California and Keawaula, Hawaii. Segment B consists of the whole of the submarine cable system provided between and including the System Interfaces at Segments A and C.[5] The System Interface is defined as the nominal 140 Megabits per second (Mbits/s) digital input/output ports on the digital distribution frame (excluding the digital distribution frame itself) where the 139,264,000 bits per second digital line section connects with other transmission facilities or equipment.

6. The HAW-5 Cable System to be supplied by AT&T will employ 1.55 micron laser technology operating at 565 Mbits/s on each working fiber pair. The capacity on each fiber pair is provided in four 140 Mbit/s streams, with each 140 Mbit/s stream containing 63 Minimum Investment Units (MIU) and each MIU consisting of a 2.048 Mbit/s bit stream containing 30 MAUOs.[6] The transpacific capacity of HAW-5 (Segment B) will be 252 MIUs (7560 MAUOs) per fiber pair, for a total capacity 504 MIUs (15,120 MAUOs), or twice the capacity of the HAW-4/TPC-3 Cable System. For voice services, circuit multiplication equipment can be employed to derive approximately 150 virtual voice paths from a MIU.

7. The estimated total costs of the HAW-5 system and the estimated Joint Applicants' combined share of the capital costs associated with each subsegment of the cable are as follows:

HAW - 5 Cable System Estimated Costs

Segment	Total Cost (Millions)	Combined Applicants' Share (Millions)
Segment B (Total Transmission Portion)	$193.0	$151.8
Segments A and C (Cable Stations)	6.0	4.7
TOTAL	$199.0	$156.5

The estimated costs do not include interest during construction, which the Joint Applicants estimate to be approximately $2.2 million. The Joint Applicants estimate that the original capital cost of a 64 Kbit/s half-circuit (half-MAUO) in HAW-5 will be $6,400. The application states that the cost of circuit multiplication equipment, which is not considered a part of the cable system, will be added as needed to serve future demand. About 85 percent of the costs of Segment B of the HAW-5 Cable System will be on a fixed price basis, and the remaining 15 percent of the cost will be on a cost-incurred basis. Items such as the submarine cable, the repeaters, the terminal transmission equipment and the high voltage power plant will be furnished on a fixed price basis. Items such as the cable laying, route survey, plowing and burial of the cable, project management, owners' inspection and amounts payable for customs duties and value added taxes will be handled on a cost-incurred basis.

8. As indicated in Appendix 1, the Joint Applicants' collective voting interest in HAW-5 is 78.67%. Appendix 2 shows ownership interests and allocation of capital, operating and maintenance costs of Segment B, and the allocation of capital, operating, and maintenance costs of Segments A and C. Appendix 3 (Schedule D of the C&MA) shows the capacity in HAW-5 that is assigned to each of the owners, upon which the costs are based. HAW-5 capacity assignments are based on the forecasted demand of each of the Joint Applicants. The assignments contemplate each Joint Applicant's proposed use of circuit multiplication equipment. Both prior and subsequent to the System Ready for Service (RFS) date (first quarter 1993), carriers, including non-owners of HAW-5, may acquire HAW-5 capacity on an IRU, lease or other mutually agreed upon basis.

9. The Joint Applicants state that HAW-5, via interconnection with the PacRimEast, Tasman-2, and PacRimWest cable systems, will improve digital restoration capabilities.[7] HAW-5 and connecting cable systems would provide the capability to utilize digital common carrier cable facilities for restoration of HAW-4/TPC-3 or TPC-4 and will enhance service reliability by providing multiple digital transmission paths to minimize the number of circuits affected by a service interruption. The Joint Applicants also note that many customers, especially those involved with data transmission, are becoming increasingly sophisticated and insist upon digital submarine cable back-up for their private networks and other custom services.

10. The Joint Applicants also state that HAW-5 will satisfy the operational requirements of DoD in the POR by providing additional necessary submarine cable capacity, media and path diversity, and redundancy. The Joint Applicants assert that HAW-5 will benefit the U.S. economy generally, and the U.S. submarine cable industry specifically, by promoting a leadership role for U.S. industry in lightwave submarine cable system technology, and will also promote international comity. They note that the new 1.55 micron technology utilized for HAW-5 will also provide significant economies.

II. DISCUSSION

11. The Joint Applicants seek authority to construct and operate the digital HAW-5 cable system to begin service in early 1993 to meet their telecommunications capacity needs and those of their correspondents in the POR during the 1993-2005 time frame. We have reviewed the Joint Application under the public convenience and necessity standard of Section 214 of the Communications Act of 1934, as amended, as well as PAS' petition to deny and the comments and reply comments filed by the State of Hawaii, DoD, the Joint Applicants, HTC and TRT/FTC. We conclude that implementation of the HAW-5 Cable System in 1993 will serve the public interest, and certify that the public convenience and necessity require the construction and operation of HAW-5 as described herein. Accordingly, we grant the Joint Application subject to certain conditions.[8]

A. The Need for the HAW-5 Cable System

12. Section 214 of the Communications Act requires that the Commission make a finding that the public convenience and necessity will be served by authorization of the facilities requested in the Joint Application. The standard we employ is "whether the specific facility chosen and the use to be made of that facility are required by the public convenience and necessity."[9] In making this determination, we traditionally have considered such factors as demand, cost, media and route diversity, restoration, intramodal and intermodal competition, technological innovations and international comity.[10] We will consider these factors here, as well as those issues raised in response to the Joint Application.

1. Demand and Capacity

13. Under the traditional form of demand analysis that we have applied in authorizing the construction and operation of submarine cable systems, we conclude that projected circuit demand, along with other factors, supports the operation of HAW-5 in 1993 to meet the telecommunications needs of the Joint Applicants and their correspondents in the POR during the 1993-2005 time frame.

14. The State of Hawaii asserts that the Commission should not authorize new facilities for the POR absent a convincing showing on the record that existing facilities are or will be fully, effectively and efficiently utilized and that any proposed new facilities are genuinely needed to meet realistically projected user demand and cost/rate effectiveness. According to the State of Hawaii, the Joint Applicants failed to address entirely the subject of user demand and related cost/rate effectiveness. Should the Commission authorize the proposed HAW-5 cable facilities without such evidence, the State of Hawaii asks that the Commission determine that costs allocated to Hawaiian points will be pooled for ratemaking purposes with costs allocated to other U.S. points, particularly the Mainland. The State of Hawaii alleges further that the public interest criteria addressed by the Joint Applicants are mostly unrelated to consumer effects and there is no demonstration that the proposed facilities can provide services not currently available. The State of Hawaii also

notes that although the Joint Applicants describe capacity as "fully subscribed", there is no data showing current utilization and traffic on existing submarine cable or satellite facilities, projected utilization by type of facility or the basis for such projections.

15. The Joint Applicants assert that HAW-5 is justified on the basis of user demand and documented by the proprietary demand forecast and Circuit Activation Plan data submitted separately by AT&T and the other Joint Applicants under confidential cover as part of the application. They state that these data, based on current information, support the necessity of having HAW-5 operational in 1993. The Joint Applicants note that data describing usage is already available for all existing Pacific cable and satellite facilities through monthly Circuit Status Reports filed with the Commission.[11] Moreover, they state that user demand is determined not only by the need for raw transmission capacity, but also by such user requirements as digital technology, route and media diversity, digital cable restoration capability, security and cost-effectiveness. However, the State of Hawaii believes that where unique requirements exist, such as demanding service by a specific mode of transmission, the user with the special requirements (technological, diversity or security related) should bear the differential in cost for such custom facilities and services.

16. We disagree with the State of Hawaii that there is insufficient information on capacity and demand to evaluate the HAW-5 application. The capacity available to the Joint Applicants on HAW-4 is publicly available information. In addition, the Joint Applicants have provided their forecasted circuit demand for HAW-5, under requests for confidentiality. We have reviewed the data provided by the Joint Applicants and conclude that HAW-5 is justified on the basis of demand. Based on this information, it does not appear that there will be adequate capacity available on existing and planned common carrier facilities to accommodate forecasted demand. HAW-5 has a total capacity of 15,120 MAUOs. By 1993, the proposed in-service date of HAW-5, the Joint Applicants project a need for 3368 MAUOs via HAW-5, which is 22.3% of its total capacity. The Joint Applicants project that use of HAW-5 will increase to 49.9% of the cable's capacity by 1997, the cable's fifth year of operation. HAW-4 will not have sufficient capacity available to accommodate this demand. By early 1990, the Joint Applicants project that HAW-4's idle capacity will be 1235 MAUOs. Even if 1235 MAUOs on HAW-4 were still available in 1993, there would still be insufficient capacity to meet the Joint Applicants' demand for digital fiber optic cable facilities. Moreover, HAW-4 is fully subscribed and use of its capacity to meet demand projected for HAW-5 would in all likelihood require foreign administrations to surrender their interests in order to allow service to other locations. In light of these circumstances, we find that the introduction of HAW-5 is needed to meet the Joint Applicants' demand for digital fiber optic cable facilities during the 1993-2005 time frame.

17. Having determined that the construction and operation of the HAW-5 Cable System is justified based on demand, we need not consider the State of Hawaii's suggestion that, in the absence of demand justification, we determine that the need for the facilities is based solely upon national interests and that the cost of such facilities not be used to justify rate increases or to delay rate reductions for Hawaiian points as compared to points in the continental United States.

18. *Presence of Other Facilities.* In considering the demand for the HAW-5 Cable System, the State of Hawaii believes that the Commission should take into account the presence of other facilities, both private and common carrier. In particular, the State of Hawaii cites pending applications for US Sprint's "Hawaii Fiber Optic-1 Cable", Transnational Telecom, Ltd.'s "Aloha Cable", the proposed PacRimEast submarine cable, and the recently authorized TPC-4 and PPAC POR cables. The Joint Applicants note that the Commission has held that private cables are not substitutes for other common carrier facilities. With respect to common carrier facilities, the Joint Applicants state that each of the proposed facilities will be considered in an appropriate Section 214 proceeding. The State of Hawaii believes that acceptance of the Joint Applicants' position would encourage "piecemeal" consideration of new facilities without an overview. According to the State of Hawaii, such an approach would lead to excessive investments and duplication of user demand. In support of its position, the State of Hawaii points to HTC's decision to invest in HAW-5 to interconnect with the North Pacific Cable (NPC), a private facility. The State of Hawaii views this arrangement as indicative of the extent of interaction among cable facilities in the POR that have not been properly reviewed by the Commission.

19. We disagree with the State of Hawaii's suggestion that other private cable facilities should be taken into consideration in determining whether the HAW-5 cable system is justified. We have previously addressed and rejected this argument in considering applications for new common carrier cable facilities. In those instances, we determined that private cables would compete with, and not supplant, common carrier facilities.[12] Moreover, we have held that private cables are risk ventures which shall succeed or fail on their own merits and not through Commission action that would guarantee common carrier use.[13] We hereby reaffirm our previous decisions on this issue.

20. We also disagree with the State of Hawaii's suggestion that other common carrier facilities have not been considered. The State of Hawaii's argument that the Commission must conduct an "overview" of facilities is essentially a request to reinstate the facilities planning process in the POR. As noted in paragraphs 41-43, *infra*, we have determined that a facilities planning process is no longer necessary as a basis for determining the need for and timing of new common carrier facilities. In the absence of such a process, the need for additional common carrier facilities is considered in the context of a Section 214 application proceeding. In this proceeding, we have taken into account other common carrier facilities in determining that there is a need for the HAW-5 Cable System. Moreover, as noted below, we believe the competitive environment and new regulatory approaches are sufficient to guard against imprudent investment in unnecessary facilities.

21. *The Effect of Price Caps Regulation.* In addition to the showing of demand, current competitive conditions and regulatory approaches provide the Joint Applicants with the incentive to make rational economic decisions and not engage in unnecessary construction of facilities.[14] In light of these factors, we noted in authorizing the construction of the TPC-4 cable system that we are now

able to give the Joint Applicants wider latitude in determining what facilities to construct and when to place such facilities in service.[15]

22. The State of Hawaii questions the effectiveness of price caps regulation in preventing unnecessary investment since it is only applicable to AT&T[16] and because it believes that the Joint Applicants have every incentive to invest in new submarine cable facilities before the next review of price-capped rates or rate-of-return regulated rates. By investing now, the State of Hawaii asserts, AT&T can have these costs and investments added to its investment and cost base to justify the next generation of price caps. Thus, it views price caps regulation as having the same characteristics as rate-of-return regulation. Further, the State of Hawaii alleges that AT&T's recently capped international rates were never appropriately justified or examined on the basis of a Commission prescribed rate of return.

23. We disagree with the State of Hawaii's view of price caps regulation. In our *TPC - 4 Decision* we stated that the price caps system of regulation is a disincentive for carriers to engage in the construction of unnecessary facilities since the burden of such investment would fall on stockholders and not ratepayers.[17] The same rationale is equally applicable here. AT&T is effectively restrained under price caps regulation from imprudent, unnecessary investment. The State of Hawaii's contention that price caps regulation provides AT&T with incentive to invest in new submarine cable facilities before the next price caps review is based on the faulty premise that such investment would be "rubber stamped" without appropriate review.

24. There is also no basis for questioning the efficacy of price caps regulation because it is not applicable to all of the Joint Applicants. We note that, with the exception of HTC, the remaining co-owners of the HAW-5 cable system are classified as non-dominant, which means that they do not possess market power. Thus, any investment in unnecessary facilities would require them to be able to raise rates to recoup such investment. As a result, any non-dominant carrier that raises rates above those set by the marketplace to recover imprudent investments risks the loss of potential customers.[18] Finally, we note that this proceeding is not the proper vehicle for considering the State of Hawaii's suggestion that AT&T's recently capped international rates were never properly justified on the basis of a Commission prescribed rate of return.

25. The State of Hawaii also asserts that international rates are not yet wholly integrated with those of the rest of the United States and, since it has not had access to the Joint Applicants' demand forecasts, it fears that Hawaii may suffer the effect of disproportionate cost distribution from these facilities. The Joint Applicants assert that the State of Hawaii's comments on ratemaking are inappropriate in a Section 214 authorization. They suggest that if the State of Hawaii feels special regulatory mechanisms are appropriate for Hawaii, it should pursue this through a rate proceeding. We agree. The State of Hawaii has not demonstrated that either current international rates are biased against Hawaii or that future rates may be biased because of unnecessary investment. The State of Hawaii's concern in this regard is based on its belief that the HAW-5 Cable System is not justified based on demand. As noted above, we believe that the State of Hawaii's concerns regarding unnecessary investment in the HAW-5 cable system are unfounded in light of the demonstrated demand for the cable system, the existence of a competitive marketplace and current regulatory approaches. Any further concerns regarding rate integration are best addressed in the context of a rate proceeding.[19]

2. Quality of Service

26. *Media and Route Diversity*. We previously have found that increasing media and route diversity to strengthen service reliability is of decisional significance in our public interest determination to authorize the construction of transoceanic facilities.[20] Media diversity enhances service reliability through the use of more than one transmission medium, satellite or cable, to carry a correspondent's traffic. As a result, an increase in media diversity protects against the systemic failure of one medium. Route, or path, diversity enhances service reliability by increasing the number of independent routes that carry traffic to a given location. It is closely related to the ability to restore circuits in case of a facility failure. As a rule, the more independent routes serving a given location, the greater the ability to restore one that fails. Thus, an increase in route or path diversity is the natural consequence of the introduction of another facility into a region.

27. DoD supports the construction of the HAW-5 cable based on its view that maximum possible diversity and redundancy of transmission paths are essential to providing the necessary degree of connectivity and survivability (*i.e.*, security) of DoD and other critical U.S. Government and private sector communications. DoD emphasizes that minimizing the number of circuits affected by the failure of a particular medium or route is extremely important from a national defense and security standpoint. DoD also states that service reliability during the period after a facility failure and before restoration is extremely important from a national defense and security standpoint. The Joint Applicants cite the advantages of an overall integrated network system as opposed to treating particular transmission equipment as merely a point-to-point facility. They state that multiple paths via each medium will allow for a fully integrated and highly reliable network.

28. We conclude that the introduction of HAW-5 as proposed will enhance both media and route diversity. HAW-5 will enhance route diversity by adding another independent route with respect to the cable as well as landing points in California and Hawaii. Moreover, route or path diversity will be enhanced between the United States and New Zealand, Australia, Japan and Southeast Asia, in that HAW-5 and connecting cable systems will provide a separate transpacific route south of the HAW-4/TPC-3 and TPC-4 cable systems. Service reliability would be improved since the number of circuits affected by a service interruption on a particular route or routes would be minimized and the ability to restore the failed facility via another digital cable facility would be enhanced.

29. With respect to media diversity, as of December 31, 1989 the Joint Applicants were providing a total of 2829 circuits, consisting of 998 submarine cable and 1831 satellite circuits to the countries and territories initially proposed to be served by HAW-5. Thus, a failure of satellite facilities could significantly disrupt services in the region. While the Commission has never specified what a preferable cable/satellite ratio would be, it is clear that the addition of the HAW-5 capacity would minimize the im-

pact of a failure of satellite facilities in the region by reducing the current imbalance in favor of satellite facilities.

30. *Restoration.* Restoration pertains to the ability to maintain service in the event of a facility outage. The Joint Applicants state that HAW-5 will provide restoration capability for POR facilities in general, and particularly the digital HAW-4/TPC-3 Cable System. Restoration of HAW-4/TPC-3 currently is occurring through the use of INTELSAT capacity. However, the Joint Applicants state that there is insufficient satellite capacity to restore HAW-4. In addition, they note that many customers, especially those requiring data communications, are becoming increasingly sophisticated and are insisting on digital cable backup for their private networks and other custom services. The State of Hawaii questions the Joint Applicants' assertion concerning the lack of satellite capacity to restore HAW-4, noting that no data was provided to justify the claim. The State of Hawaii also notes that if every cable and satellite facility can be justified on the need for additional restoration capacity, there will be a never ending justification for new facilities without regard to demand.

31. We find that HAW-5 will provide restoration capabilities that currently are unavailable by allowing for digital cable restoration via a self-healing (self-restoration) design that has a stand-by transmission path for the entire route across the Pacific and uses redundant equipment for automatic protection switching. Although the Commission has previously recognized that satellite capacity provides a satisfactory restoration alternative for cable, we also have recognized that absolute reliance on satellite facilities to meet restoration needs and increased demand may not be in the best interests of users that may have specific communications requirements that may best be accommodated by fiber optic cable facilities.[21] In light of the increasing reliance on digital facilities we find that it is reasonable for the Joint Applicants to seek an alternative cable route to prevent placing all of their forecasted cable demand on a single digital cable system. Service reliability would also be enhanced since an additional digital fiber optic cable route would be available for restoration of those digital services disrupted by an outage. Moreover, the fact that all of the services would not be on a single digital cable facility would lessen the impact caused by a service disruption on a similar facility.

3. Cost Analysis

32. The Joint Application estimates the total cost of HAW-5 to be $199.0 million, with the Joint Applicants' share to be $156.5 million. In addition, it estimates that interest during construction will be $2.2 million. The estimated original capital cost of a 64 Kbit/s half-circuit (half-MAUO) is approximately $6,400.[22] The Joint Application notes that the unit cost of a virtual voice channel in HAW-5 will be further reduced through the addition and use of digital circuit multiplication technology, which can derive nominally 150 virtual voice channels from a MIU (30 MAUOs).

33. The State of Hawaii questions the adequacy of the cost information filed in the Joint Application. It asserts that the "original capital cost" per channel is of questionable validity in light of a history of inaccuracies in such projections. In addition, the State of Hawaii notes that the figures do not relate to revenue requirements per channel utilized and the Joint Application does not contain any analysis regarding channel utilization, the impact of early obsolescence and the potential for accelerated depreciation of existing facilities.

34. The Joint Applicants state that they have provided the requisite cost information, including a break down of costs for each system subsegment, underseas portion, cable station portion, percentage fixed price, percentage cost-incurred price, and unit cost. With respect to the State of Hawaii's question regarding the credibility of the original capital cost for half-MAUOs, the Joint Applicants assert that these costs were taken directly from the official HAW-5 financial records which reflect the best information available to the HAW-5 owners. They also note that there is no reason for them to go beyond the customary level of detail, particularly considering the Commission's recent statement that the detailed analyses of facility costs traditionally undertaken are no longer necessary in the present price caps environment.[23]

35. We find that the cost information contained in the Joint Application is sufficient to allow a determination on the need for the HAW-5 Cable System. The cost data submitted is similar in type to cost data previously submitted and accepted in other cable construction applications. In those cases, the cost data was found to be sufficient, and nothing has changed in the interim to warrant the submission of more detailed cost information. Accordingly, we reject the State of Hawaii's suggestion that the Joint Applicants' cost information should also include revenue requirements per channel utilized and an analysis of such factors as channel utilization, the impact of early obsolescence and the potential for accelerated depreciation of existing facilities. Moreover, the State of Hawaii's insistence on additional and more specialized cost data runs contra to recent Commission statements that analysis of such cost data need not be as detailed in a price caps environment.[24] We also find that the State of Hawaii has provided no basis for questioning the validity of the original capital cost of a half-MAUO in HAW-5. Although the State of Hawaii refers to a "history" of inaccuracies in such projections, it has failed to provide any evidence for doubting the accuracy of cost estimate contained in the instant application. Absent any evidence that the HAW-5 financial records do not accurately reflect the cost of the system, we find no reason to question the validity of the cost information extracted therefrom.

4. Technological Innovations

36. In determining the need for additional facilities in a region, the Commission typically considers to what extent the proposed facilities will introduce new technology. In some instances, the effect of introducing new technology in the region is compelling, such as introducing digital fiber optic technology for the first time. In other cases, the technological innovations may not be as significant, such as improvements in laser technology in an area where digital fiber optic technology is already available. The technological advances made possible by HAW-5 involve both. Insofar as purely domestic service is concerned, HAW-5 will introduce AT&T's latest 1.55 micron laser and 565 Mbit/s technology to the POR. The 1.55 micron technology reduces the number of repeaters that would have been required with 1.3 micron laser technology. The reduced number of repeaters, in turn, results in cost savings to the HAW-5 Cable System. With respect to international service to Australia and New Zealand, we note that HAW-5 will interconnect with the PacRimEast

cable to provide the first digital fiber-optic submarine cable capability directly linking the United States to these countries. Thus, it will be responsible, in part, for introducing digital fiber optic technology to these locations. In light of these factors, we find that HAW-5 will serve the public interest by introducing new technology insofar as its international uses and providing further advancements in digital fiber optic technology in its domestic applications.

5. Competition Considerations

37. *Intermodal and Intramodal Competition.* We previously have recognized that enhancing both intermodal and intramodal competition can be expected to spur providers of both international satellite and cable services to keep their services innovative and their prices low.[25] We find that introduction of HAW-5 will enhance intramodal competition in the POR and encourage both private and common carrier cable operators to innovate and price their offerings in a manner that is calculated to attract and retain customers. We also find that introduction of HAW-5 will increase intermodal competition with INTELSAT and potential separate satellite system providers and thereby spur existing providers of both cable and satellite capacity to respond competitively. Such competition will give service providers and other users greater choice in selecting facilities and thus will enable them to maintain, or improve and enhance, the economy and efficiency of their operations. The opportunity to choose among a range of facilities further allows service providers to be more responsive to customer needs in terms of price, service quality, and service availability.

38. *Competitive Procurement.* Although the State of Hawaii acknowledges that there may not be a reason to impose a particular procurement scheme on the Joint Applicants, it states that the Joint Applicants have failed to disclose the procurement practices they intend to use. The State of Hawaii argues that information on procurement practices is necessary in this instance because 85 percent of the costs of Segment B will be on a fixed price basis. Specifically, the State of Hawaii believes that to give meaning to fixed-price contracts, the Commission must ensure that both the prime contracts and subcontracts for engineering, manufacturing, supply, installation, and maintenance of the cable be awarded on a competitive basis. AT&T and HTC note that HAW-5 procurement decisions are not matters on which the Joint Applicants can, by themselves, change because 17 of the 23 HAW-5 owners are carriers from outside the United States. They state that contracts for procurement of the system will be awarded to those firms in the market best able to meet the requirements of HAW-5 in a cost-effective matter and the HAW-5 owners must have the flexibility in their day-to-day installation operations to secure quality products and services on a timely basis. In this regard, the Joint Applicants reference the procurement of the TPC-4 Cable System in which the Commission did not specify a particular method for the selection of subcontractors. They also note that the provisioning of a portion of the HAW-5 cable system by a United States company will: 1) be beneficial to the U.S. economy; 2) enhance the role of U.S. industry as a world leader in submarine lightwave cable technology; and 3) continue to ensure that the U.S. submarine cable industry is a viable competitor and that the prices of future submarine cable systems remain as low as possible.

39. We find no basis to question the procurement practices of the Joint Applicants. The Joint Application states that qualified suppliers will be afforded a reasonable opportunity to participate in the procurement of HAW-5. The procurement of HAW-5 is therefore consistent with our goal to assure U.S. opportunity to participate in procurement and supply processes.[26] As the Joint Application notes, the U.S.-supplied portions of HAW-4/TPC-3 used more than 65 subcontractors from 22 states. The Joint Applicants also anticipate that a multitude of subcontractors will participate in the construction or provision of materials for any portion of HAW-5 that will be supplied by AT&T.[27] We also observe that the competitive presence of the NPC cable also will serve as a strong incentive for efficient procurement of HAW-5. Moreover, under price caps regulation, AT&T has the incentive to subcontract with those suppliers that offer a competitive price. Given the existing incentives to subcontract in a cost-effective manner, we do not believe it is necessary to condition the grant of HAW-5 on further assurances of competitive procurement practices.

6. International Comity

40. Our decisions authorizing the construction and operation of transoceanic submarine cable systems historically have recognized that correspondent acceptance is an important public interest factor.[28] Twenty-three telecommunications entities and carriers, including those from 14 foreign countries, have agreed that the HAW-5 system design and 1993 service date will meet the service needs of their customers. Thus, we conclude that HAW-5 will promote international comity.

B. Other Issues

41. *The Need for A Planning Proceeding.* The State of Hawaii is concerned that the Joint Applicants fail to address or acknowledge previous Commission planning or authorization dockets for the POR.[29] Although the State of Hawaii concedes that the Commission can act without undertaking planning proceedings, it believes that the Commission has to continue to view applications in a broader planning perspective to ensure that ratepayers are not burdened with unnecessary facility investments. Of particular concern to the State of Hawaii is the fact that the *POR Planning* proceeding, which covered the 1995 time frame, did not contemplate the proposed cable or additional cable facilities.

42. The Joint Applicants state that there is no need for them to address the *POR Planning* proceeding because the Commission has specifically determined that separate facilities planning dockets are not required as a matter of law and are not necessary as a matter of policy in the current competitive environment.[30] Further, they note that all of the facilities considered in the *POR Planning* proceeding have either been placed into operation or are in the final stages of construction, and the specific facility configuration considered in the *POR Planning* proceeding in 1985 is no longer at issue.

43. In authorizing the construction and operation of the TPC-4 Cable System, we addressed the issue of whether a planning process is required before authorization of new POR facilities. In the *TPC - 4 Decision* we found that there is no requirement in the Communications Act that this Commission must undertake a facilities planning process before it considers a Section 214 application to construct and operate a submarine cable system. Further, we

stated that Section 214 of the Act provides ample authority for Commission consideration of those factors that bear on a public interest, convenience and necessity determination.[31] Citing several recent developments, we concluded that we could now move away from a comprehensive planning process prior to authorizing the introduction of new facilities in the POR. First, we noted that the introduction of price caps regulation of AT&T significantly protects AT&T ratepayers from the results of potentially imprudent facilities investments. Second, we noted that the elimination of circuit distribution guidelines in favor of agreements between Comsat and AT&T and other carriers on the distribution of traffic between cable and satellite facilities and the introduction of competing private cable and satellite systems provide incentives for efficient investments in transmission facilities. In light of these developments, we found it unnecessary to engage in a facilities planning process before acting on the Section 214 application to construct and operate the TPC-4 cable system. Nothing has changed in the interim, and the State of Hawaii has not pointed to any compelling reasons which would justify reinstating the planning process. Accordingly, we hereby reaffirm our previous findings on this subject.[32]

44. *HTC Issues*. The State of Hawaii believes that in the context of this proceeding the Commission should pay particular attention to issues involving HTC. First, the State of Hawaii asserts that it is unclear why HTC would use HAW-5, a cable connecting the U.S. Mainland and Hawaii, to serve Japan. Second, the State of Hawaii points to "discrepancies" in HTC's reporting of the amount of cable capacity in use to Japan. According to the State of Hawaii, HTC reports that its current cable capacity to Japan is 77 circuits but that, in a recent application for additional POR satellite circuits, HTC reported only 66 cable circuits to Japan. On the basis of the lower number, the State of Hawaii notes that HTC was authorized to acquire 22 additional satellite circuits to Japan over the next two years. The State of Hawaii also questions HTC's need for the HAW-5 capacity based on current international traffic patterns specified in HTC's company reports. The State of Hawaii cites HTC's ownership of fiber optic circuit capacity in HAW-4, its ownership interests in other cable facilities and its ownership of satellite earth station facilities that, along with GTE Spacenet, provide satellite circuit capacity between the U.S. Mainland and Hawaii.

45. Based on these factors, the State of Hawaii cites two levels of concern. It states that under assignment provisions set forth in Section 24 of the HAW-5 C&MA, the capacity could be reassigned by HTC to its parent company, GTE Corporation, merely by giving written notice to other parties to the C&MA. In addition, it believes that GTE Corporation is likely to seek District Court relaxation of the GTE Consent Decree restrictions, particularly those that bar it from interstate/interLATA service provision.[33] Thus, the State of Hawaii fears that HTC's capacity could be assigned to GTE Corporation for affiliated company (or GTE Operating Company) provision of interstate/interLATA services in the future. The State of Hawaii asserts that HTC has provided GTE Corporation affiliates with other such assets at little, or no, cost previously and such future action could adversely and directly affect Hawaiian ratepayers.

46. Upon consideration of the concerns raised by the State of Hawaii and HTC's response to those concerns, we find no basis to deny HTC's proposed participation in the HAW-5 Cable System. HTC indicates that it would use HAW-5 capacity to reach the U.S. Mainland to interconnect with the NPC cable in Oregon, a routing arrangement required to provide IMTS and private line service to Japan via HTC's correspondent, International Digital Communication (IDC), a competitor of Kokusai Denshin Denwa (KDD) in Japan. HTC notes that capacity is not available on the TPC-3 cable to Japan for the joint use of HTC and IDC.[34] HTC indicates that the remaining capacity it proposes to acquire on HAW-5 would be used for service between Hawaii and Europe.

47. We find that HTC's past usage of POR cable facilities clearly supports its participation in HAW-5 for international service to Europe as well as Pacific locations. We also reject the State of Hawaii's suggestion that because of IDC's partial ownership in TPC-4, a cable scheduled to be operational before HAW-5 in 1991, HTC should be required to justify why it could not purchase IRUs on TPC-4 and use them in conjunction with the IDC-owned circuits to provide the same service over a more economic routing. First, we note that the TPC-4 cable is fully subscribed and IDC's interest in the cable system is very limited, consisting of only three MIUs. Of the three MIUs, one each is assigned for service with US Sprint, MCI and British Telecommunications. Second, assuming, *arguendo*, that capacity were available on TPC-4, HTC would still have to obtain facilities to reach the U.S. Mainland to access the TPC-4 cable. In light of the State of Hawaii's concern with using HAW-5 to reach the U.S. Mainland to interconnect with the NPC cable, it is unclear why using a similar route to access the TPC-4 cable would be any less circuitous.[35] Moreover, we find no basis to question HTC's business judgment in choosing to route traffic carried in conjunction with IDC via the NPC cable given the extent of HTC's current and projected traffic between Hawaii and Japan and IDC's considerable ownership interest in the NPC cable. In view of these circumstances, we find no reason to question HTC's decision to route its traffic in a particular manner.

48. There is also no discrepancy apparent in HTC's reporting of circuits in service between the Hawaii and Japan. In its application to acquire additional POR satellite circuits, HTC indicated that it had 66 cable circuits in service as of October 31, 1989. Attachment A to the Joint Application indicates that as of December 31, 1989, HTC had 77 cable circuits in operation between Hawaii and Japan. Based on this information, it would appear that HTC activated an additional 11 cable circuits for service to Japan between October 31, 1989 and December 31, 1989. In addition, contrary to the State of Hawaii's claims, HTC does not own satellite earth stations facilities or provide satellite circuit capacity for service to the U.S. Mainland. An affiliated company, GTE Spacenet, does own and operate such capacity. However, we fail to see the significance of GTE Spacenet, albeit a sister company of HTC, owning and operating domestic earth station and satellite facilities capable of service paralleling the proposed HAW-5 system. We note that subject to some limited exceptions not relevant here, the GTE Spacenet system is authorized to provide domestic service which HTC cannot provide. Even if the GTE Spacenet system could be used to connect with international facilities on the U.S.

Mainland for international service. HTC would have to account for the cost of using the GTE Spacenet system in pricing its service.

49. We also find no merit in the State of Hawaii's argument that HTC could transfer HAW-5 capacity to its parent, GTE Corporation, at little or no cost and apparently with no regulatory oversight. Although the State of Hawaii's concerns are based on the terms of the C&MA, we note that paragraph 59, *infra*, clearly provides that the Commission retains jurisdiction "over all matters relating to the Joint Applicants' ownership, management, maintenance, and operation of the cable system as authorized herein." This provision is broad enough to permit us to address the specific concerns of the State of Hawaii. Moreover, the State of Hawaii's concern that GTE Corporation might seek relief from the interstate service restraints in the GTE Consent Decree and that HAW-5 facilities could be used for interstate services is speculative and not germane to our decision here. Should GTE Corporation seek such relief, its request would be subject to appropriate judicial and regulatory review.

50. *PAS Petition to Deny*. PAS does not oppose a grant of the HAW-5 cable. Rather, PAS' petition to deny is directed solely to TRT/FTC's ownership interest in the cable and the relationship of TRT/FTC to France Telecom which has refused to engage in two-way service via PAS' separate satellite system. Although PAS has secured INTELSAT Article XIV(d) consultations for all of its services with many countries, it notes that France has been a prominent exception. According to PAS, despite clear customer interest in both data and video transmissions to and from France, France Telecom has consistently refused to consider any INTELSAT Article XIV(d) consultations for services beyond one-way video (U.S. to France). Thus, PAS argues, the French telecommunications market remains effectively closed to U.S. separate satellite systems. Since France Telecom holds a 14.9 percent interest in TRT/FTC through various subsidiaries and holding companies, PAS asserts that TRT/FTC should not be authorized to expand its operations in the United States during the pendency of its petition for reconsideration of the Common Carrier Bureau's *FTCC Ruling*.[36] It states that the Commission has authority to evaluate market access issues in acting on Section 214 applications such as the instant application involving TRT/FTC.

51. PAS' argument on this point is not new. In its *FTCC Ruling*, the Bureau concluded that FTCC (now TRT/FTC) should be classified as non-dominant in its provision of all international services to all points,[37] except that it would continue to be classified as dominant in its provision of all common carrier services with France. The *FTCC Ruling* conditioned the grant of non-dominant status to all points except France on the amendment of FTCC's existing Section 214 authorization for switched voice services to France to include certain standards applicable to the access filings of dominant carriers. The *FTCC Ruling* also concluded that TRT should not be treated as a dominant carrier either generally or for the French market. PAS sought reconsideration of the *FTCC Ruling*. During the pendency of its petition for reconsideration, PAS has filed several petitions to deny applications filed by TRT/FTC for the acquisition of facilities to provide its authorized services to various countries. In each case, the Bureau found that PAS had failed to explain why TRT/FTC should be considered to possess market power with countries other than France. In the context of this proceeding, PAS requests that the subject application be denied with regard to participation by TRT/FTC or, at a minimum, held in abeyance pending final resolution of its petition for reconsideration of the *FTCC Ruling*.

52. On June 1, 1990, the Bureau released its *FTCC Reconsideration Order*, which affirmed the *FTCC Ruling* in all respects.[38] Specifically, the Bureau affirmed its earlier determination that FTCC does not fall strictly within the definition of a foreign-owned carrier. The Bureau also affirmed its finding that PAS has not provided any evidence to demonstrate that FTCC should be classified as a foreign-owned and, consequently, dominant carrier in its provision of international common carrier services solely because of the presence of a French Cables et Radio (FCR) representative director on the board of the holding company, ICH. PAS did not file an application for review of the *FTCC Reconsideration Order*; accordingly, its request for deferral pending resolution of that proceeding is moot. Even if TRT/FTCC had been found to be dominant for services to countries other than France, PAS has not explained why, in this case, TRT/FTC's participation in HAW-5 should be denied. As the Bureau noted in the *FTCC Reconsideration Order*, while PAS may be correct that there has been little or no progress with France on issues of concern to PAS, there has been progress with France on other issues, such as lower accounting rates with U.S. carriers, which has continued. Accordingly, we deny PAS' request that we deny or hold in abeyance that portion of the application which relates to TRT/FTC's participation in HAW-5.

III. CONCLUSION AND ORDERING CLAUSES

53. The instant application to construct and operate the HAW-5 optical fiber cable system will serve the public convenience and necessity. The proposed system is required to meet forecasted demand and to satisfy the service preferences and needs of users. Because of technological innovation, the half-circuit cost for capacity in HAW-5 is approximately half the cost for comparable capacity in HAW-4. The HAW-5 Cable System will provide service quality benefits in terms of increased route and media diversity and restoration capability, and will enhance intermodal and intramodal competition. The proposed system also meets international comity concerns.

54. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorizations will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[39] Consequently, no environmental assessment is required to be submitted with this Joint Application by Section 1.1311 of the Commission's Rules.

55. Upon consideration of the Joint Application, we find that the present and future public interest, convenience and necessity require the construction and operation of the HAW-5 cable system as described herein.

56. Accordingly, IT IS ORDERED that the Joint Application, File No. I-T-C-90-081, of the Joint Applicants (AT&T, HTC, MCII, TRT/FTC, US Sprint and Worldcom)[40] is GRANTED, subject to the following terms, conditions and limitations, and the Joint Applicants are authorized to:

(a) construct and operate the HAW-5 Cable System as proposed herein;

(b) acquire and activate capacity in the HAW-5 Cable System, on an ownership basis, in accordance with the interests indicated in the MIUs specified in Appendix 3;

(c) acquire capacity, by lease, in such connecting facilities as may be required to extend capacity in the HAW-5 Cable System;

(d) utilize digital circuit multiplication systems (DCMS) equipment to derive additional voice paths from the circuits (MIUs) authorized herein in accordance with the appropriate Commission authorizations; and

(e) activate and operate capacity in the HAW-5 Cable System and aforementioned extension facilities for the provision of the Joint Applicants' authorized telecommunications services.

57. IT IS FURTHER ORDERED that when a given Joint Applicant seeks to acquire or transfer an ownership or IRU interest in the HAW-5 capacity, the reimbursement it receives shall be on the basis of depreciated original cost (or the pro-rated accumulated cost of such circuit if the systems are not then operational) or in conformance with such policy as the Commission shall develop in the future regarding the price at which IRUs will be made available.

58. IT IS FURTHER ORDERED that the Joint Applicants shall make available half-interests in the HAW-5 capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity.

59. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate U.S. carriers' interests in capacity herein authorized, as the public interest may require to accommodate additional carriers or otherwise, with, where required, the concurrence of the foreign administration or carriers concerned, and, further, jurisdiction is retained by the Commission over all matters relating to the Joint Applicants' ownership, management, maintenance, and operation of the cable system as authorized herein, to assure the most efficient use not only of this cable system, but of all means of communications between the U.S. and Pacific Ocean Region.

60. IT IS FURTHER ORDERED that the Commission retains jurisdiction to review the DCMS, multiplexing, and interworking arrangements and attribution of the costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

61. IT IS FURTHER ORDERED that no Joint Applicant that is deemed a dominant carrier pursuant to the Commission's decision in CC Docket No. 85-107[41] shall dispose of any interest in any HAW-5 capacity it is authorized to acquire in any way without prior authorization by the Commission.

62. IT IS FURTHER ORDERED that the Joint Applicants shall include HAW-5 facility use in the monthly Circuit Status Reports filed pursuant to the Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceding month.

63. IT IS FURTHER ORDERED that PAS' Petition to Deny IS DENIED.

64. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to the Joint Applicants herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39), covering the subject submarine cable, and shall become effective upon the acceptance of the aforementioned license by all such parties.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Three carriers originally listed as Joint Applicants are no longer involved in the acquisition of HAW-5 capacity. By letter dated June 20, 1990 the Commission approved the *pro forma* transfer of control and assignment of licenses from FTCC to TRT/FTC. The transaction was consummated on June 29, 1990, which resulted in TRT/FTC as the sole surviving carrier. *See* File Nos. CSG-90-027-(5)AL and I-T-C-90-067-TC. Long Distance/USA (LD/USA) has been acquired by US Sprint and the capacity LD-USA originally proposed to acquire in HAW-5 has been assigned to US Sprint. Also, Fedex International Transmission Corporation has withdrawn from HAW-5.

[2] Although AT&T did not indicate that its reply was filed on behalf of the Joint Applicants, the pleading clearly represents their position. Thus, all references herein to the Joint Applicants' position should be construed as including the views expressed in the Joint Application and AT&T's reply.

[3] All applicants initially may not be certified to serve directly all territories that the facilities covered by the application are capable of serving. Each applicant proposing the extension of its services into such territories by means of the HAW-5 facilities will be required to seek such appropriate authorization as may be required when it proposes to activate the facilities.

[4] With a capacity of 15,120 MAUOs, HAW-5 is designed as a part of an integrated common carrier network to meet specific service requirements for additional digital cable facilities in the POR, to provide additional digital connectivity with the HAW-4/TPC-3, G-P-T, TPC-4, H-J-K, Tasman-2, PacRimEast and PacRimWest cable systems. *See* Appendix 4.

[5] The HAW-5 Cable System will be armored where required in shallow water. It will also be fish bite protected as necessary at the depths where this phenomenon may occur. Also, in order to protect the cable from damage due to fishing and trawler activities off the North American Continental Shelf, the cable will be buried.

[6] A MIU is the minimum unit of ownership investment in the HAW-5 Cable System and is the equivalent of 30 MAUOs. Interests in fewer than 30 MAUOs may be purchased on an indefeasible right of user (IRU) basis. A MAUO is an equivalent digital channel operating at 64,000 bits per second and an additional 9,684.656 bits per second required for multiplexing.

[7] Today we also grant the Joint Applicants' separate requests to construct and operate the PacRimEast and PacRimWest cable systems. The Tasman-2 cable will be considered at a later date.

[8] In a separate decision, we also grant the Joint Applicants' request for a cable landing license (File No. S-C-L-90-004) pursuant to the Cable Landing License Act.

[9] AT&T *et al.*, (*TAT-7 Order*), 73 F.C.C. 2d 248, 256 (1979).

[10] *See, e.g., AT & T et al.* (*TAT-9 Order*), 4 FCC Rcd 1129, 1131 (Com. Car. Bur. 1988). *See also Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs during the Period 1981 - 1985* (*POR Planning*), 102 FCC 2d 353, 355 (1985).

[11] The State of Hawaii disputes this point, noting that the Circuit Status Reports do not show usage or traffic carried over the subject facilities, but instead the quantity of circuits held and/or owned by each of the carriers without regard to use.

[12] *See Tel-Optik Limited* (*Private Submarine Cable*), 100 F.C.C. 2d 1033, 1049 (1985); *Pacific Telecom Cable, Inc.*, 2 FCC Rcd 2686, 2690, n. 15 (Com. Car. Bur 1987); *clarified*, 4 FCC Rcd 4454, 4455 (Comm. Car. Bur. 1989). *Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet North Atlantic Needs During the 1991 - 2000 Period*, 3 FCC Rcd 3979, 3989-90 (1988) (*North Atlantic Facilities Planning*).

[13] *Id.*

[14] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989) (*Price Caps Order*).

[15] *See American Telephone & Telegraph, et. al.*, 4 FCC Rcd 8042, 8046 (1989) (*TPC-4 Decision*).

[16] Price caps regulation also applies to HTC. *See Policy and Rules for Dominant Carriers*, CC Docket No. 87-313, para. 255 (FCC 90-314, released Oct. 4, 1990).

[17] *Id.* at 8045.

[18] *See International Competitive Carrier Policies*, 102 F.C.C. 2d 812, 829 (1985)(*International Competitive Carrier); recon. denied*, 60 RR 2d (P&F) 1435 (1986); *US Sprint Communications Company Limited Partnership*, 4 FCC Rcd 6279, 6284 (Com. Car. Bur. 1989).

[19] In 1985, the Commission issued a Notice of Proposed Rule Making that terminated the inquiry into the compatibility of rate integration and competition for interstate communications between the contiguous states and Hawaii. At that time, the State of Hawaii also asserted that the Hawaii should not be disadvantaged by being singled out for a special rate structure. The State of Hawaii added that the rate integration policy, which it supported, had substantially achieved its objective of lowering rates between the noncontiguous points and the contiguous states. *See Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers*, 50 Fed. Reg. 41714 (October 15, 1985). The State of Hawaii's concern about the integration of international rates and the potential impact of the Joint Applicants' investment in HAW-5 on Hawaii ratepayers would appear to be lessened by the fact that two-thirds of HAW-5 capacity is assigned for domestic use.

[20] *See North Atlantic Facilities Planning*, 3 FCC Rcd at 3986; *All America Cable and Radio Inc., et. al.*, 67 FCC 2d 451, 469 (1978).

[21] *North Atlantic Facilities Planning*, 3 FCC Rcd at 3987.

[22] The cost of HAW-4 was $191.4 million for its total capacity of 7,560 MAUOs. HAW-5 offers twice the capacity of HAW-4 for a total cost of $199 million. Therefore, the capital cost of each HAW-5 MAUO will be almost half the cost of a similar unit of capacity on HAW-4.

[23] *See TPC-4 Decision*, 4 FCC Rcd at 8046.

[24] *Id.* Both AT&T and HTC are under price caps regulation.

[25] *North Atlantic Facilities Planning*, 3 FCC Rcd at 3989.

[26] *See Pacific Telecom Cable, Inc.*, 4 FCC Rcd 8061, 8066 (1989).

[27] While we rely solely on the record set forth above, we note that AT&T was awarded contracts in the sum of $191 million to construct one-half of TPC-4. *See FCC Press Release*, October 16, 1989.

[28] *See North Atlantic Facilities Planning*, 3 FCC Rcd at 3989.

[29] *See supra* footnote 10.

[30] *See TPC-4 Decision*, 4 FCC Rcd at 8045.

[31] *Id.*

[32] We also note that even under the POR planning process U.S. Mainland-Hawaii domestic facilities were typically excluded. Thus, the fact that the HAW-5 cable was not contemplated in the POR planning process is understandable given the fact that 66.6 % of the cable system will be used for purely domestic service.

[33] *See U.S. v. GTE Corp.*, 603 F. Supp. 730 (D.C. Cir. 1984).

[34] We fail to see the basis for the State of Hawaii's suggestion that we investigate KDD's failure to "interconnect" with respect to TPC-3 capacity. The State of Hawaii's argument in this regard is apparently based on its belief that KDD will not make available to its competitor, IDC, some of its capacity in TPC-3 for joint IDC-HTC use. Contrary to the State of Hawaii's characterization, this is not an "interconnection" issue. Rather, the issue is the business judgment of the owners in deciding the amount of capacity to purchase in particular cable systems. Apparently, there has been no request from IDC to acquire capacity in TPC-3 for joint use with HTC, which is indicative of a lack of interest in such a routing arrangement. Although we are concerned with the efficient use of telecommunications facilities, there in no basis on the record to warrant substituting our judgment for the business decisions of IDC and HTC.

[35] TPC-4, which extends from California to Japan, does not land in Hawaii.

[36] *FTC Communications, Inc.*, 4 FCC Rcd 5633 (Com. Car. Bur. 1989) (*FTCC Ruling); recon. denied*, 5 FCC Rcd 3323 (Com. Car. Bur. 1990) (*FTCC Reconsideration Order*).

[37] *See supra* footnote 1.

[38] *FTC Communications, Inc.*, 5 FCC Rcd 3323 (Com. Car. Bur. 1990).

[39] *See* Joint Application at p. 21.

[40] *See supra* note 1.

[41] *See International Competitive Carrier*, 102 FCC 2d at 822, 832.

APPENDIX 1

SCHEDULE B

VOTING INTERESTS IN THE HAW-5 CABLE SYSTEM

PARTIES	PERCENT
AT&T	51.98413
BT PLC (UK)	1.28968
DBP (Germany)	0.49603
FT (France)	0.19841
HKTI (Hong Kong)	0.39683
HTC	1.78571
IDC (Japan)	0.19841
ITALCABLE (Italy)	0.09921
ITDC (Taiwan)	0.09921
ITJ (Japan)	0.09921
KDD (Japan)	0.79365
MCII	11.50794
MCL (UK)	0.89286
NPTT (Netherlands)	0.09921
OTC (Australia)	12.40079
PLDT (Philippines)	1.19048
RTT (Belgium)	0.19841
STA (Sweden)	0.09921
TELEGLOBE (Canada)	0.69444
TNI (New Zealand)	2.08333
TRT/FTC	0.19841
US SPRINT	11.90476
WORLDCOM	1.28968
TOTAL	100.00000

APPENDIX 2

SCHEDULE C

OWNERSHIP INTERESTS AND ALLOCATION OF CAPITAL, OPERATING AND MAINTENANCE COSTS OF SEGMENT B; AND ALLOCATION OF CAPITAL, OPERATING, AND MAINTENANCE COSTS OF SEGMENTS A AND C OF THE HAW-5 CABLE SYSTEM

PARTIES	SEGMENT A	SEGMENT B	SEGMENT C
AT&T	51.98413	51.98413	51.98413
BT PLC	1.28968	1.28968	1.28968
DBP	0.49603	0.49603	0.49603
FT	0.19841	0.19841	0.19841
HKTI	0.39683	0.39683	0.39683
HTC	1.78571	1.78571	1.78571
IDC	0.19841	0.19841	0.19841
ITALCABLE	0.09921	0.09921	0.09921
ITDC	0.09921	0.09921	0.09921
ITJ	0.09921	0.09921	0.09921
KDD	0.79365	0.79365	0.79365
MCII	11.50794	11.50794	11.50794
MCL	0.89286	0.89286	0.89286
NPTT	0.09921	0.09921	0.09921
OTC	12.40079	12.40079	12.40079
PLDT	1.19048	1.19048	1.19048
RTT	0.19841	0.19841	0.19841
STA	0.09921	0.09921	0.09921
TELEGLOBE	0.69444	0.69444	0.69444
TNI	2.08333	2.08333	2.08333
TRT/FTC	0.19841	0.19841	0.19841
US SPRINT	11.90476	11.90476	11.90476
WORLDCOM	1.28968	1.28968	1.28968
TOTAL	100.00000	100.00000	100.00000

NOTE:
The percentages set forth above are calculated from MIU assignments shown in Schedule D.

APPENDIX 3

SCHEDULE D

SUMMARY

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	HALF NIU INTERESTS
AT&T	82	221	524
BT PLC	13	0	13
DBP	5	0	5
FT	2	0	2
MCTI	4	0	4
NTC	0	9	18
IDC	2	0	2
ITALCABLE	1	0	1
ITDC	1	0	1
ITJ	1	0	1
KDD	8	0	8
MCII	12	52	116
MCL	9	0	9
NPTT	1	0	1
OTC	125	0	125
PLDT	12	0	12
RTT	2	0	2
STA	1	0	1
TELEGLOBE	7	0	7
TNI	21	0	21
TRT/FTC	2	0	2
US SPRINT	6	57	120
WORLDCOM	1	6	13
TOTAL	318	345	1008

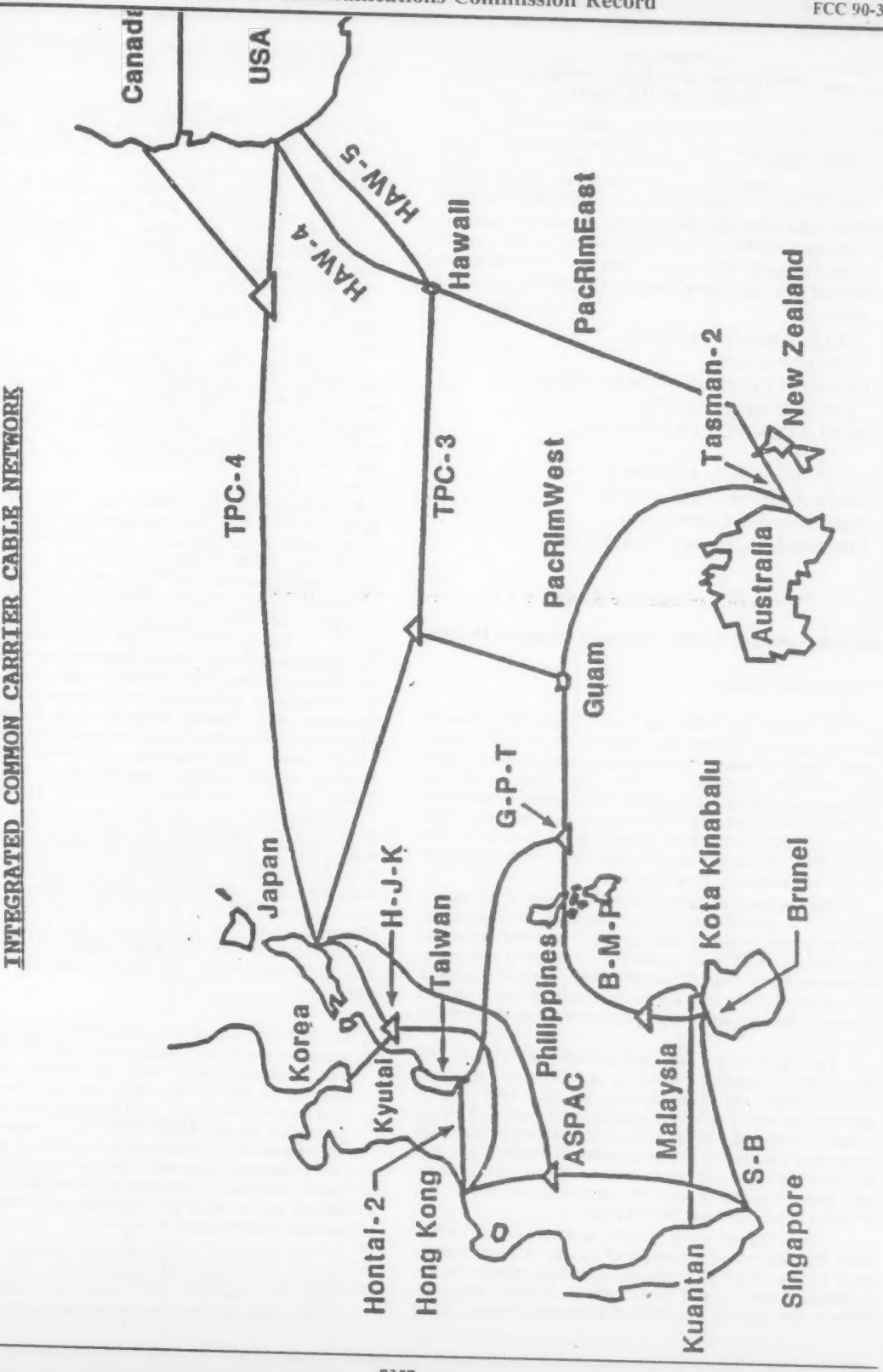
ASSIGNMENT OF NIUS

JOINTLY ASSIGNED NIU CAPACITY IN THE NAU-5 CABLE SYSTEM

PARTIES	ITDC	OTC	PLDT	TNI	SUBTOTAL
AT&T	1	63	12	6	82
BT PLC	0	10	0	3	13
DBP	0	4	0	1	5
FT	0	1	0	1	2
MCTI	0	4	0	0	4
IDC	0	2	0	0	2
ITALCABLE	0	1	0	0	1
ITJ	0	1	0	0	1
KDD	0	7	0	1	8
MCII	0	9	0	3	12
MCL	0	8	0	1	9
NPTT	0	1	0	0	1
RTT	0	1	0	1	2
STA	0	1	0	0	1
TELEGLOBE	0	5	0	2	7
TRT/FTC	0	2	0	0	2
US SPRINT	0	4	0	2	6
WORLDCOM	0	1	0	0	1
SUBTOTAL	1	125	12	21	159

WHOLLY ASSIGNED NIU CAPACITY

PARTIES	
AT&T	221
NTC	9
MCII	52
US SPRINT	57
WORLDCOM	6
SUBTOTAL	345


PACIFIC REGION
INTEGRATED COMMON CARRIER CABLE NETWORK
Canada
USA
HAW-5
HAW-4
Hawaii
PacRimEast
Tasman-2
New Zealand
TPC-4
TPC-3
PacRimWest
Australia
Guam
G-P-T
Japan
H-J-K
Taiwan
Korea
Kyutai
Philippines
B-M-P
Kota Kinabalu
Brunei
ASPAC
Malaysia
S-B
Hontai-2
Hong Kong
Kuantan
Singapore

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
GTE HAWAIIAN TELEPHONE COMPANY, INC.
MCI INTERNATIONAL, INC.
TRT/FTC TELECOMMUNICATIONS CORPORATION
US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP
WORLD COMMUNICATIONS, INC.

File No. SCL-90-003

Joint Application for a License to
Land and Operate a High Capacity
Digital Submarine Cable System
Extending from Hawaii to New Zealand

CABLE LANDING LICENSE

Adopted: November 8, 1990; Released: December 10, 1990

By the Commission:

1. On March 15, 1990, six United States International Service Carriers (hereinafter referred to as Joint Applicants)[1] filed the above-captioned joint application requesting authority pursuant to "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, to land and operate a high capacity digital submarine cable system known as the PacRimEast Cable System (PacRimEast), extending from Hawaii to Takapuna, New Zealand.

2. The PacRimEast cable system will land at Keawaula, Hawaii and extend directly to Takapuna, New Zealand. The proposed cable system consists of three segments. Segments A and C are, respectively, the cable stations at Keawaula, Hawaii and Takapuna, New Zealand. Segment B consists of the whole submarine cable system provided between, and including, the system interfaces at Segments A and C.[2]

3. The PacRimEast cable system will employ 1.55 micron laser technology operating at 565 Mbit/s on each working fiber pair. The capacity on each fiber pair is provided in four 140 Mbit/s streams, with each 140 Mbit/s stream containing 1890 minimum assignable units of ownership (MAUOs). [3] The capacity of PacRimEast will be 7560 MAUOs. For voice services, digital circuit multiplication equipment can be employed to derive 150 virtual voice paths from 30 MAUOs.

4. The proposed cable system will be owned by the Joint Applicants and a number of foreign telecommunications entities. Foreign telecommunications entities in the following locations will participate as owners: Australia, Canada, the Federal Republic of Germany, France, Hong Kong, Ireland, Italy, Japan, the Netherlands, New Zealand, the Philippines, Spain, Taiwan and the United Kingdom.

5. Pursuant to our obligations under 47 U.S.C. §§34-39, the Department of State has been notified and has approved the landing of the PacRimEast cable system in the Hawaii.

6. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorizations will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[4] Consequently, no environmental assessment is required to be submitted with this Joint Application by Section 1.1311 of the Commission's Rules.

7. Concurrent with consideration of this application, this Commission has granted the applicants authority under Section 214 of the Communications Act of 1934, as amended, to construct and operate the PacRimEast cable system. For the reasons set forth in that order, we find that this application requesting a cable landing license should be granted.

8. Accordingly, this Commission HEREBY GRANTS AND ISSUES under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, and pursuant to authority delegated to this Commission under Executive Order No. 10530, dated May 10, 1954, 3 C.F.R. 1954-1958 Comp., p.189 (1961), *reprinted in* 3 U.S.C.A. §301 at 1052 (1985), to the applicants (AT&T, HTC, MCII, TRT/FTC, US Sprint and Worldcom)[5] a license to land and operate one high capacity digital submarine cable having a nominal capacity of 565 Mbit/s with associated regenerators and supervisory circuits and armoring where necessary extending between Hawaii on the north and New Zealand on the south. This license is subject to: (1) "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39; (2) the Communications Act of 1934, as amended, 47 U.S.C. §§151-609; (3) subsequent applicable acts; (4) all rules and regulations of the Federal Communications Commission; (5) any treaties or conventions relating to communications to which the United States of America is now or may hereafter become a party; (6) any actions by the Commission or the Congress of the United States of America rescinding, changing, modifying, or amending any rights accruing to any person; and (7) the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensees at their expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensees shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with

a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) The Licensees or any persons or companies controlling them or controlled by them do not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensees or any persons or companies controlling them or controlled by them are parties;

(4) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensees to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, or for failure to comply with the terms of the authorization;

(6) The Licensees shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

(7) The terms and conditions upon which this license is given shall be accepted by the Licensees by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Joint Applicants include American Telephone and Telegraph Company (AT&T), GTE Hawaiian Telephone Company Incorporated (HTC), MCI International, Inc. (MCII), TRT/FTC Communications, Inc. (TRT/FTC), US Sprint Communications Company Limited Partnership (US Sprint) and World Communications, Inc. (Worldcom). By letter dated June 20, 1990 the Commission approved the *pro forma* transfer of control and assignment of licenses from FTCC to TRT/FTC. The transaction was consummated on June 29, 1990, which resulted in TRT/FTC as the sole surviving carrier. *See* File Nos. CSG-90-027-(5)AL and I-T-C-90-067-TC.

[2] The System Interface is defined as the nominal 140 Mbit/s digital input/output ports on the digital distribution frame (excluding the digital distribution frame itself) where the 139,264,000 bits per second digital line section connects with other transmission facilities or equipment.

[3] A MAUO is an equivalent digital channel operating at 64,000 bits per second and an additional 9,684,656 bits required for multiplexing.

[4] *See* Section 214 Application, File No. I-T-C-90-072, at p. 20.

[5] *See supra* n. 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
MCI INTERNATIONAL, INC.
OVERSEAS TELECOMMUNICATIONS, INC.
TRT/FTC COMMUNICATIONS CORPORATION
US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP
WORLD COMMUNICATIONS, INC.

File No. SCL-90-005

Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable System between the U.S. Territory of Guam and Australia

CABLE LANDING LICENSE

Adopted: November 8, 1990; Released: December 10, 1990

By the Commission:

1. On April 20, 1990, six United States International Service Carriers (hereinafter referred to as Joint Applicants)[1] filed the above-captioned joint application requesting authority pursuant to "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, to land and operate a high capacity digital submarine cable system known as the PacRimWest Cable System (PacRimWest), extending between Guam and Sydney, Australia.

2. The PacRimWest cable system will land in the United States Territory of Guam and extend directly to a landing point in Sydney, Australia. The proposed cable system consists of three segments. Segments A and C are, respectively, the cable stations at Dededo, Guam and Sydney, Australia. Segment B consists of the whole submarine cable system provided between and including the system interfaces at Segments A and C.[2]

3. The PacRimWest cable system will employ 1.55 micron laser technology operating at 565 Mbit/s on each working fiber pair. The capacity on each fiber pair is provided in four 140 Mbit/s streams, with each 140 Mbit/s stream containing 1890 minimum assignable units of ownership (MAUOs). [3] The capacity of PacRimWest will be 7560 MAUOs. For voice services, digital circuit multiplication equipment can be employed to derive 150 virtual voice paths from 30 MAUOs.

4. The proposed cable system will be owned by the Joint Applicants and a number of foreign telecommunications entities. Foreign telecommunications entities in the following locations will participate as owners: Australia, Brunei, Canada, the Federal Republic of Germany, France, Hong Kong, Italy, Japan, Korea, Malaysia, the Netherlands, New Zealand, the Philippines, Singapore, Taiwan and the United Kingdom.

5. Pursuant to our obligations under 47 U.S.C. §§34-39, the Department of State has been notified and has approved the landing of the PacRimWest cable system in the United States Territory of Guam.

6. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorizations will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[4] Consequently, no environmental assessment is required to be submitted with this Joint Application by Section 1.1311 of the Commission's Rules.

7. Concurrent with consideration of this application, this Commission has granted the applicants authority under Section 214 of the Communications Act of 1934, as amended, to construct and operate the PacRimWest cable system. For the reasons set forth in that order, we find that this application requesting a cable landing license should be granted.

8. Accordingly, this Commission HEREBY GRANTS AND ISSUES under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, and pursuant to authority delegated to this Commission under Executive Order No. 10530, dated May 10, 1954, 3 C.F.R. 1954-1958 Comp., p.189 (1961), *reprinted in* 3 U.S.C.A. §301 at 1052 (1985), to the applicants (AT&T, MCII, OTI, TRT/FTC, US Sprint and Worldcom)[5] a license to land and operate one high capacity digital submarine cable having a nominal capacity of 565 Mbit/s with associated regenerators and supervisory circuits and armoring where necessary extending between the United States Territory of Guam on the north and Australia on the south. This license is subject to: (1) "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39; (2) the Communications Act of 1934, as amended, 47 U.S.C. §§151-609; (3) subsequent applicable acts; (4) all rules and regulations of the Federal Communications Commission; (5) any treaties or conventions relating to communications to which the United States of America is now or may hereafter become a party; (6) any actions by the Commission or the Congress of the United States of America rescinding, changing, modifying, or amending any rights accruing to any person; and (7) the following conditions:

> (1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensees at their expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensees shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) The Licensees or any persons or companies controlling them or controlled by them do not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensees or any persons or companies controlling them or controlled by them are parties;

(4) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensees to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, or for failure to comply with the terms of the authorization;

(6) The Licensees shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

(7) The terms and conditions upon which this license is given shall be accepted by the Licensees by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Joint Applicants include American Telephone and Telegraph Company (AT&T), MCI International, Inc. (MCII), Overseas Telecommunications, Inc. (OTI), TRT/FTC Communications, Inc. (TRT/FTC), US Sprint Communications Company Limited Partnership (US Sprint) and World Communications, Inc. (Worldcom). By letter dated June 20, 1990 the Commission approved the *pro forma* transfer of control and assignment of licenses from FTCC to TRT/FTC. The transaction was consummated on June 29, 1990, which resulted in TRT/FTC as the sole surviving carrier. *See* File Nos. CSG-90-027-(5)AL and I-T-C-90-067-TC.

[2] The System Interface is defined as the nominal 140 Mbit/s digital input/output ports on the digital distribution frame (excluding the digital distribution frame itself) where the 139,264,000 bits per second digital line section connects with other transmission facilities or equipment.

[3] A MAUO is an equivalent digital channel operating at 64,000 bits per second and an additional 9,684.656 bits per second required for multiplexing.

[4] *See* Section 214 Application, File No. I-T-C-90-097, at p. 17.

[5] *See supra* n. 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
MCI INTERNATIONAL, INC.
OVERSEAS TELECOMMUNICATIONS, INC.
TRT/FTC COMMUNICATIONS CORPORATION
US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP
WORLD COMMUNICATIONS, INC.

File No. I-T-C-90-097

Joint Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable System Between the United States Territory of Guam and Australia

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: November 8, 1990; Released: December 10, 1990

By the Commission:

1. The Commission has under consideration the above-captioned Joint Application filed on April 20, 1990, by American Telephone and Telegraph Company (AT&T), MCI International, Inc. (MCII), Overseas Telecommunications, Inc. (OTI), TRT/FTC Communications, Inc. (TRT/FTC), US Sprint Communications Company Limited Partnership (US Sprint) and World Communications, Inc. (Worldcom) (hereinafter collectively called the Joint Applicants).[1] The Joint Applicants seek authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214 (1982), to construct and operate a high capacity digital optical fiber submarine cable system, known as PacRimWest Cable System (PacRimWest), extending between the United States Territory of Guam on the north, and Sydney, Australia on the south. PacRimWest will be jointly owned by 28 telecommunications administrations and carriers, including the Joint Applicants. The Joint Applicants propose that PacRimWest will be in service in fourth quarter 1994.

2. The Joint Applicants also seek authority to (1) acquire capacity in PacRimWest; (2) acquire, by lease, such extension facilities as may be required to extend capacity in PacRimWest; (3) activate and operate capacity in PacRimWest and the aforementioned extension facilities for the provision of their respectively authorized telecommunications services; and (4) convey to their correspondents or to non-owners, on an indefeasible right of user (IRU) basis, half-interests in certain capacity currently assigned to a Joint Applicant to permit said IRU recipients to provide their authorized services over PacRimWest.

3. The Joint Application was placed on public notice on May 2, 1990. A petition to deny was filed by Pan American Satellite (PAS). TRT/FTC filed reply comments to PAS.

I. THE APPLICATION

4. The Joint Applicants will use PacRimWest to supplement their existing facilities in the provision of service that each applicant presently is furnishing or subsequently may furnish between the U.S. and Australia and New Zealand.[2] PacRimWest will be connected with the domestic networks in the United States and Australia, and will be extended by suitable facilities to the borders of other countries participating in PacRimWest or to the terminals of other international communications systems, including other cable terminals and satellite earth stations.

5. The Construction and Maintenance Agreement (C&MA) for PacRimWest was initialed on September 29, 1989. The cable system consists of three segments: Segments A and C are, respectively, the cable stations at Sydney, Australia and Dededo, Guam and Segment B consists of the whole of the submarine cable system provided between and including the System Interfaces at Segments A and C. The System Interface is defined as the nominal 140 Megabits per second (Mbits/s) digital input/output ports on the digital distribution frame (excluding the digital distribution frame itself) where the 139,264,000 bits per second digital line section connects with other transmission facilities or equipment.

6. PacRimWest will operate at 565 Mbit/s on each working pair. [3] The capacity of each fiber is provided in four 140 Mbit/s streams, with each 140 Mbit/s stream contains 1890 minimum assignable units of ownership (MAUOs).[4] The capacity of PacRimWest (Segment B) will be 7560 MAUOs. For voice services, digital circuit multiplication equipment can be employed to derive 150 virtual voice paths from thirty MAUOs.

7. The estimated total cost of PacRimWest and the estimated Joint Applicants' combined share of capital costs associated with each subsegment of the cable are as follows:

PacRimWest Cable System Estimated Costs

Segment	Total Cost (Millions)	Combine Joint Applicants' Share (Millions)
Segment B (Total Transmission Portion)	$275.0	$50.4
Segments A and C (Cable Stations)	$ 7.0	$ 1.3
TOTAL	$282.0	$51.7

The estimated cost does not include interest during construction, which the Joint Applicants estimate to be $12 million. The cost of circuit multiplication equipment is not included since such equipment is not considered part

of the cable system and will be added as needed to serve future demand. About 85 percent of the costs of Segment B of the PacRimWest cable system will be on a fixed price basis, and the remaining 15 percent of the cost will be on a cost-incurred basis. Items such as the submarine cable, the repeaters, the terminal transmission equipment and the high voltage power plant will be furnished on a fixed price basis. Items such as the cable laying, system integration route survey, plowing and burial of the cable, project management, owners' inspection and amounts payable for customs duties and value added taxes will be handled on a cost-incurred basis.

8. As indicated in Appendix 1, the Joint Applicants' collective voting interest in PacRimWest is 18.31%. Appendix 2 shows the ownership interests and allocation of capital, operating and maintenance costs of Segment B as well as the proportions of capital, operating and maintenance costs for use of Segments A and C. Appendix 3 (Schedule D of the C&MA), lists capacity assignments to the parties. The assignments contemplate each Joint Applicant's proposed use of circuit multiplication equipment. Both prior and subsequent to the System Ready for Service (RFS) date (fourth quarter 1994), carriers, including non-owners of PacRimWest, may acquire PacRimWest capacity on an IRU, lease or other mutually agreed upon basis.

9. The Joint Application states that PacRimWest is the first digital fiber optic submarine cable directly linking the U.S. Territory of Guam and Australia. PacRimWest is part of an integrated common carrier network designed to meet specific service requirements for additional digital cable facilities in the POR and will provide additional digital connectivity to the HAW-4/TPC-3, G-P-T, TPC-4, H-J-K, Tasman-2 and PacRimEast cable systems.[5] The Joint Applicants note that PacRimWest will improve digital cable restoration capabilities via interconnection with Tasman-2 and PacRimEast and would also provide the capability to utilize digital common carrier cable facilities for restoration of HAW-4/TPC-3 or TPC-4. They also state that many customers, especially those involved with data transmission, are becoming increasingly sophisticated and insisting upon digital submarine cable back-up for their private networks and other custom services.

10. The Joint Applicants also claim that PacRimWest will satisfy the operational requirements of the Department of Defense (DoD) in the POR by providing additional necessary submarine cable capacity, media and path diversity, and redundancy. They note that the new 1.55 micron technology utilized for PacRimWest will provide significant economies. The Joint Applicants estimate the original capital cost of 64 Kbit/s half-circuit (half-MAUO) in PacRimWest will be $38,000.[6]

II. DISCUSSION

11. The Joint Applicants seek authority to construct and operate the digital PacRimWest cable system to begin service in 1994 and meet their telecommunications capacity needs and those of their correspondents in the POR during the 1994-2005 time frame. We have reviewed the Joint Application under the public convenience and necessity standard of Section 214 of the Communications Act of 1934, as amended, as well as PAS' petition to deny and TRT/FTC's opposition to PAS' petition to deny. We conclude that implementation of the PacRimWest cable system in 1994 will serve the public interest, and certify that the public convenience and necessity require the construction and operation of PacRimWest as described herein. We grant the Joint Application subject to certain conditions.[7]

A. The Need for the PacRimWest Cable System

12. Section 214 of the Communications Act requires that the Commission make a finding that the public convenience and necessity will be served by authorization of the facilities requested in the Joint Application. The standard we employ is "whether the specific facility chosen and the use to be made of that facility are required by the public convenience and necessity."[8] In making this determination, we traditionally have considered such factors as demand, cost, media and route diversity, restoration, intramodal and intermodal competition, technological innovations and international comity.[9] We will consider these factors here, as well as those issues raised in response to the Joint Application.

1. Demand and Capacity

13. Under the traditional form of demand analysis that we have applied in authorizing the construction and operation of submarine cable systems, we conclude that projected circuit demand, along with other factors, supports the introduction of PacRimWest in 1994 to meet the telecommunications needs of the Joint Applicants and their correspondents in the POR during the 1994-2005 time frame. Currently, the Joint Applicants have exhausted all of their capacity in existing common carrier cable facilities capable of serving Australia and New Zealand. Attachment A to the Joint Application indicates that as of December 31, 1989, the Joint Applicants activated a total of 2,139 circuits for service to Australia and New Zealand. Of this total, approximately 65% (1384) were routed via satellite facilities. In addition, the circuit data submitted by the Joint Applicants project significant growth in demand for both satellite and cable facilities. Without the introduction of PacRimWest as proposed in 1994, all growth traffic would have to be accommodated via satellite facilities.

14. The Joint Applicants propose to acquire 1356 half-MAUOs in PacRimWest. In 1994, the Joint Applicants project a need for 159 half-MAUOs to be routed via PacRimWest, approximately 11.7% of their total investment in PacRimWest. They project that over the next three years, the demand for digital cable circuits via PacRimWest will be 515 half-MAUOs in 1995, 687 half-MAUOs in 1996 and 760 half-MAUOs in 1997. Thus, in PacRimWest's fourth year of operation, the Joint Applicants will have activated approximately 56% of their total investment in PacRimWest. In light of the unavailability of cable facilities for service to Australia and New Zealand and the current cable/satellite ratio, we conclude that there is sufficient demand for the introduction of PacRimWest in 1994 to permit the Joint Applicants to route a portion of their forecasted demand via these digital cable facilities.[10]

2. Cost Analysis

15. The Joint Application estimates the total costs of PacRimWest to be $282.0 million, with the Joint Applicants' share to be $51.7 million. In addition, it estimates that interest during construction will be $12.0 million. The Joint Application also provides the

subsegment costs, the Joint Applicants' share of the subsegment costs, the percentages of fixed and cost-incurred costs, and the cost of a 64 Kbit/s half-circuit. We find that the information provided is sufficient to support the application to participate in PacRimWest.[11]

16. As noted above, PacRimWest is required to satisfy forecasted demand in general, and the specific demand for digital cable facilities. In addition, PacRimWest will be the first digital fiber optic cable directly linking Australia and the U.S. Territory of Guam and, through interconnection with other digital cable facilities in the region, will link Australia to Hawaii, the U.S. Mainland and other POR locations. We also note that the Joint Applicants' investment in PacRimWest will provide customers with the advantages of digital technology and increased capacity at significantly lower costs compared to existing analog cable facilities. For example, a 4 kHz half-circuit in the analog ANZCAN cable between Hawaii and Australia cost $90,857 in 1984 dollars. In contrast, the total cost for a digital 64 Kbit/s half-circuit between Hawaii and Guam via TPC-3 and between Guam and Australia via PacRimWest would be $58,441, approximately 64% of the cost of an ANZCAN analog 4 kHz half-circuit.[12]

3. Quality of Service

17. *Media and Route Diversity.* We previously have found that increasing media and route diversity to strengthen service reliability is of decisional significance in our public interest determination to authorize the construction of transoceanic facilities.[13] Media diversity enhances service reliability through the use of more than one transmission medium, satellite or cable, to carry a correspondent's traffic. As a result, an increase in media diversity protects against the systemic failure of one medium. Route, or path, diversity enhances service reliability by increasing the number of independent routes that carry traffic to a given location. It is closely related to the ability to restore circuits in case of a facility failure. As a rule, the more independent routes serving a given location, the greater the ability to restore one that fails. Thus, an increase in route or path diversity is the natural consequence of the introduction of another facility into a region.

18. We conclude that the introduction of PacRimWest as proposed will enhance both media and route diversity. PacRimWest will enhance route diversity by adding another independent route between Guam and Australia and between the Australia and U.S. Mainland and Hawaii via interconnection with TPC-3 and HAW-5. Moreover, route or path diversity will be enhanced between the United States and Japan and Southeast Asia, in that PacRimWest through interconnection with Tasman-2, PacRimEast, HAW-5 and connecting cable systems will provide a separate transpacific route south of the HAW-4/TPC-3 and TPC-4 cable systems. Service reliability would be improved since the number of circuits affected by a service interruption on a particular route or routes would be minimized and the ability to restore the failed facility via another digital cable facility would be enhanced.

19. With respect to media diversity, as of December 31, 1989 the Joint Applicants were providing a total of 2139 circuits, consisting of 755 submarine cable and 1384 satellite circuits between the U.S. and Australia and New Zealand. Thus, a failure of satellite facilities could significantly disrupt services in the region. While the Commission has never specified what a preferable cable/satellite ratio would be, it is clear that the addition of the PacRimWest capacity would minimize the impact of a failure of satellite facilities in the region.

20. *Restoration.* Restoration pertains to the ability to maintain service in the event of a facility outage. The Joint Application states that PacRimWest will improve digital cable restoration capabilities via interconnection with the Tasman-2 and PacRimEast cable systems, which would provide the capability to utilize digital common carrier cable facilities for restoration of HAW-4/TPC-3 or TPC-4. In addition, the Joint Applicants note that many customers, especially those requiring data communications, are becoming increasingly sophisticated and are insisting on digital cable backup for their private networks and other custom services.

21. We find that PacRimWest will provide restoration capabilities that currently are unavailable by allowing for digital cable restoration via a self-healing (self-restoration) design. Restoration of HAW-4/TPC-3 currently is occurring through the use of INTELSAT capacity. Although the Commission has previously recognized that satellite capacity provides a satisfactory restoration alternative for cable, we also have recognized that absolute reliance on satellite facilities to meet restoration needs and increased demand may not be in the best interests of users that may have specific communications requirements that may best be accommodated by fiber optic cable facilities.[14] In light of these factors, we conclude that it is reasonable for the Joint Applicants to seek an alternative cable route that would allow for increased digital connectivity in the POR to increase restoration options for digital cable facilities.

4. Technological Innovations

22. PacRimWest will be the first digital fiber optic submarine cable directly linking the U.S. Territory of Guam and Australia. In addition, PacRimWest, through interconnection with the Tasman-2 cable, will provide an additional digital fiber optic route between the U.S. and New Zealand. With the increasing demand for digital cable facilities, we find that introduction of digital fiber optic technology between the U.S. and New Zealand and Australia justifies the Joint Applicants' participation in PacRimWest.[15] The introduction of new technology is significant since there are no cable systems serving these locations with available capacity.

5. Competition Considerations

23. *Intermodal and Intramodal Competition.* We previously have recognized that enhancing both intermodal and intramodal competition can be expected to spur providers of both international satellite and cable services to keep their services innovative and their prices low.[16] We find that introduction of PacRimWest will enhance intramodal competition in the POR and encourage both private and common carrier cable operators to innovate and price their offerings in a manner that is calculated to attract and retain customers. We also find that introduction of PacRimWest will increase intermodal competition with INTELSAT and potential separate satellite system providers and thereby spur existing providers of both cable and satellite capacity to respond competitively. Such competition will give service providers and other users greater choice in selecting facilities and thus will enable them to maintain, or improve and enhance, the economy and efficiency of their operations. The opportunity to

choose among facilities further allows service providers to be more responsive to customer needs in terms of price, service quality, and service availability.

6. International Comity

24. Our decisions authorizing the construction and operation of transoceanic submarine cable systems historically have recognized that correspondent acceptance is an important public interest factor.[17] Twenty-eight telecommunications entities and carriers, including those from 16 foreign countries, have agreed that the PacRimWest system design and 1994 service date will meet the service needs of their customers. Thus, we conclude that PacRimWest will promote international comity.

B. Other Issues

25. *PAS Petition to Deny*. PAS does not oppose a grant of PacRimWest. Rather, PAS' petition to deny is directed solely to TRT/FTC's ownership interest in the cable and the relationship of TRT/FTC to France Telecom which has refused to engage in two-way service via PAS' separate satellite system. Although PAS has secured INTELSAT Article XIV(d) consultations for all of its services with many countries, it notes that France has been a prominent exception. According to PAS, despite clear customer interest in both data and video transmissions to and from France, France Telecom has consistently refused to consider any INTELSAT Article XIV(d) consultations for services beyond one-way video (U.S. to France). Thus, PAS argues, the French telecommunications market remains effectively closed to U.S. separate satellite systems. Since France Telecom holds a 14.9 percent interest in TRT/FTC through various subsidiaries and holding companies, PAS asserts that TRT/FTC should not be authorized to expand its operations in the United States during the pendency of its petition for reconsideration of the Common Carrier Bureau's *FTCC Ruling*.[18] It states that the Commission has authority to evaluate market access issues in acting on Section 214 applications such as the instant application involving TRT/FTC.

26. PAS' argument on this point is not new. In its *FTCC Ruling*, the Common Carrier Bureau concluded that FTCC (now TRT/FTC) should be classified as non-dominant in its provision of all international services to all points,[19] except that it would continue to be classified as dominant in its provision of all common carrier services with France. The *FTCC Ruling* conditioned the grant of non-dominant status to all points except France on the amendment of FTCC's existing Section 214 authorization for switched voice services to France to include certain standards applicable to the access filings of dominant carriers. The *FTCC Ruling* also concluded that TRT should not be treated as a dominant carrier either generally or for the French market. PAS sought reconsideration of the *FTCC* ruling. During the pendency of its petition for reconsideration, PAS has filed several petitions to deny applications filed by TRT/FTC for the acquisition of facilities to provide its authorized services to various countries. In each instance, the Bureau found that PAS failed to explain why TRT/FTC should be considered to possess market power with countries other than France. In the context of this proceeding, PAS requests that the subject application be denied with regard to participation by TRT/FTC or, at a minimum, held in abeyance pending final resolution of its petition for reconsideration of the *FTCC Ruling*.

27. On June 1, 1990, the Bureau released its *FTCC Reconsideration Order*, which affirmed the *FTCC Ruling* in all respects.[20] Specifically, the Bureau affirmed its earlier determination that FTCC does not fall strictly within the definition of a foreign-owned carrier. The Bureau also affirmed its finding that PAS has not provided any evidence to demonstrate that FTCC should be classified as a foreign-owned and, consequently, dominant carrier in its provision of international common carrier services solely because of the presence of an French Cables et Radio (FCR) representative director on the board of the holding company, ICH. PAS did not file an application for review of the *FTCC Reconsideration Order*; accordingly, its request for deferral pending resolution of that proceeding is moot. Even if TRT/FTC had been found to be dominant for services to countries other than France, PAS has not explained why, in this case, TRT/FTC's participation in PacRimWest should be denied. As the Bureau noted in the *FTCC Reconsideration Order*, while PAS may be correct that there has been little or no progress with France on issues of concern to PAS, there has been progress with France on other issues, such as lower accounting rates with U.S. carriers, which has continued. Accordingly, we deny PAS' request that we deny or hold in abeyance that portion of the application which relates to TRT/FTC's participation in PacRimWest.

III. CONCLUSION AND ORDERING CLAUSES

28. The instant application to construct and operate the PacRimWest optical fiber cable system will serve the public convenience and necessity. The proposed system is required to satisfy the increased demand in general, and the specific demand for digital cable facilities. Currently, the Joint Applicants have exhausted all available capacity in analog cable facilities serving Australia and New Zealand. Thus, all growth traffic will have to routed via satellite facilities over which the Joint Applicants already route 65% of their traffic to Australia and New Zealand. PacRimWest will introduce digital fiber optic cable technology directly between the Territory of Guam and Australia, and between Australia and the U.S. Mainland, Hawaii and other POR locations through interconnection with other digital cable facilities in the region. PacRimWest will also improve quality of service by increasing route and media diversity, enhancing restoration capabilities, and promoting intermodal and intramodal competition. The proposed system also meets international comity concerns.

29. Based on the information provided by the Joint Applicants, we conclude that the grant of the instant application will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[21] Consequently, no environmental assessment is required to be submitted with this Joint Application by Section 1.1311 of the Commission's Rules.

30. Upon consideration of the Joint Application, we find that the present and future public interest, convenience and necessity require the construction and operation of the PacRimWest cable system as described herein.

31. Accordingly, IT IS ORDERED that the Joint Application, File No. I-T-C-90-097, of the Joint Applicants (AT&T, MCII, OTI, TRT/FTC, US Sprint and

Worldcom)[22] is GRANTED, subject to the following terms, conditions and limitations, and the Joint Applicants are authorized to:

(a) construct and operate the PacRimWest Cable System as proposed herein;

(b) acquire and activate capacity in the PacRimWest Cable System, on an ownership basis, in accordance with the interests indicated in the MAUOs specified in Appendix 3;

(c) acquire capacity, by lease, in such connecting facilities as may be required to extend capacity in the PacRimWest Cable System;

(d) utilize digital circuit multiplication systems (DCMS) equipment to derive additional voice paths from the circuits (MAUOs) authorized herein in accordance with the appropriate Commission authorizations; and

(e) activate and operate capacity in the PacRimWest Cable System and aforementioned extension facilities for the provision of the Joint Applicants' authorized telecommunications services.

32. IT IS FURTHER ORDERED that when a given Joint Applicant seeks to acquire or transfer an ownership or IRU interest in the PacRimWest capacity, the reimbursement it receives shall be on the basis of depreciated original cost (or the pro-rated accumulated cost of such circuit if the systems are not then operational) or in conformance with such policy as the Commission shall develop in the future regarding the price at which IRUs will be made available.

33. IT IS FURTHER ORDERED that the Joint Applicants shall make available half-interests in the PacRimWest capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity.

34. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate U.S. carriers' interests in capacity herein authorized, as the public interest may require to accommodate additional carriers or otherwise, with, where required, the concurrence of the foreign administration or carriers concerned, and, further, jurisdiction is retained by the Commission over all matters relating to the Joint Applicants' ownership, management, maintenance, and operation of the cable system as authorized herein, to assure the most efficient use not only of this cable system, but of all means of communications between the U.S. and Pacific Ocean Region.

35. IT IS FURTHER ORDERED that the Commission retains jurisdiction to review the DCMS, multiplexing, and interworking arrangements and attribution of the costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

36. IT IS FURTHER ORDERED that no Joint Applicant that is deemed a dominant carrier pursuant to the Commission's decision in CC Docket No. 85-107[23] shall dispose of any interest in any PacRimWest capacity it is authorized to acquire in any way without prior authorization by the Commission.

37. IT IS FURTHER ORDERED that the Joint Applicants shall include PacRimWest facility use in the monthly Circuit Status Reports filed pursuant to the Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceding month.

38. IT IS FURTHER ORDERED that PAS' Petition to Deny IS DENIED.

39. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to the Joint Applicants herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39), covering the subject submarine cable, and shall become effective upon the acceptance of the aforementioned license by all such parties.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX 1

SCHEDULE B

VOTING INTERESTS

IN THE CABLE SYSTEM

PacRim West

PARTIES	VOTING INTEREST PERCENTAGE
AT&T	11.3452
BT PLC (UK)	4.0519
CAPWIRE (Philippines)	0.0270
CHHK (Hong Kong)	3.2415
DBP (Germany)	0.8104
ETPI (Philippines)	0.0270
FT (France)	0.8104
FTCC	0.8104
IDC (Japan)	1.6207
ITALCABLE (Italy)	0.4052
ITDC (Taiwan)	0.9995
ITJ (Japan)	0.8104
JTB (Brunei)	0.0540
KDD (Japan)	6.4830
KTA (Korea)	0.6078
MCII	3.6467
MCL (UK)	2.8363
NPTT (Netherlands)	0.4052
OTC (Australia)	49.4597
OTI	0.0810
PHILCOM (Philippines)	0.6078
PLDT (Philippines)	0.8104
STM (Malaysia)	1.4181
TAS (Singapore)	1.2155
TCNZ (New Zealand)	2.5527
TELEGLOBE (Canada)	2.4311
TRT	0.4052
US SPRINT	1.6207
WORLDCOM	0.4052
TOTAL:	100.0000

APPENDIX 2
SCHEDULE C

OWNERSHIP INTERESTS AND ALLOCATION OF CAPITAL, OPERATING AND MAINTENANCE COSTS OF SEGMENT B; AND PROPORTIONS OF CAPITAL, OPERATING AND MAINTENANCE COSTS FOR USE OF SEGMENTS A AND C

PacRim West

PARTIES	VOTING INTEREST PERCENTAGE
AT&T	11.3452
BT PLC	4.0519
CAPWIRE	0.0270
CWHK	3.2415
DBP	0.8104
ETPI	0.0270
FT	0.8104
FTCC	0.8104
IDC	1.6207
ITALCABLE	0.4052
ITDC	0.9995
ITJ	0.8104
JTB	0.0540
KDD	6.4830
KTA	0.6078
MCII	3.6467
MCL	2.8363
NPTT	0.4052
OTC	49.4597
OTI	0.0810
PHILCOM	0.6078
PLDT	0.8104
STM	1.4181
TAS	1.2155
TCNZ	2.5527
TELEGLOBE	2.4311
TRT	0.4052
US SPRINT	1.6207
WORLDCOM	0.4052
TOTAL:	100.0000

APPENDIX 3

SCHEDULE D

ASSIGNMENT OF CAPACITY IN SEGMENT B IN HALF INTERESTS IN MAUOs

PacRim West

1. Jointly Assigned Capacity (Half Interests in MAUOs)

PARTIES	OTC	TCNZ	SUBTOTAL
AT&T	810	30	840
BT PLC	300	0	300
CAPWIRE	2	0	2
CWHK	240	0	240
DBP	60	0	60
ETPI	2	0	2
FT	60	0	60
FTCC	60	0	60
IDC	120	0	120
ITALCABLE	30	0	30
ITDC	60	14	74
ITJ	60	0	60
JTB	4	0	4
KDD	420	60	480
KTA	30	15	45
MCII	270	0	270
MCL	210	0	210
NPTT	30	0	30
OTI	6	0	6
PHILCOM	45	0	45
PLDT	45	15	60
STM	90	15	105
TAS	60	30	90
TELEGLOBE	180	0	180
TRT	30	0	30
US SPRINT	120	0	120
WORLDCOM	30	0	30
SUBTOTAL	3374	179	

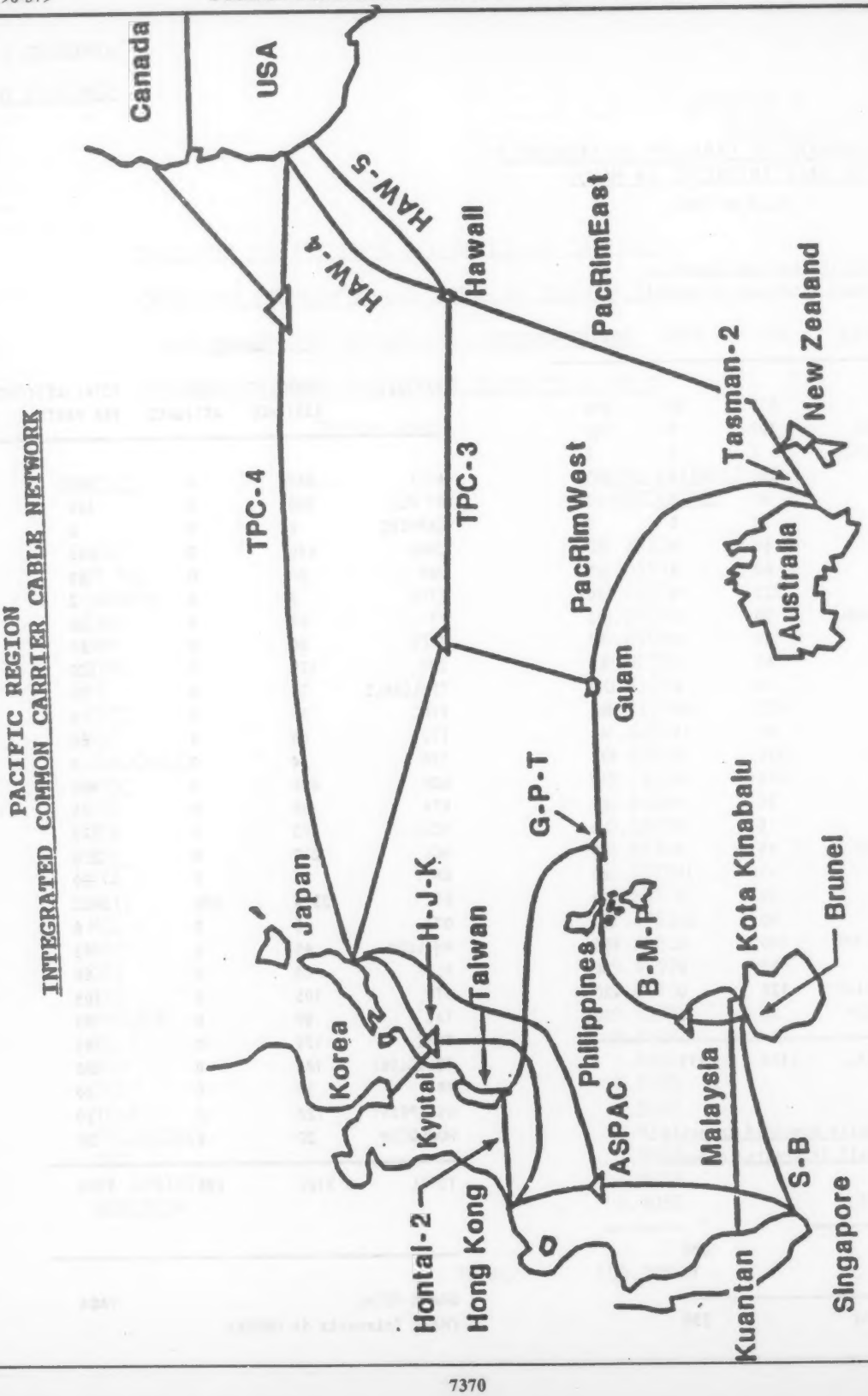
2. Wholly Assigned Capacity (Half Interests in MAUOs)

PARTIES	
OTC	288
TCNZ	10
SUBTOTAL	298

Summary

PARTIES	JOINTLY ASSIGNED	WHOLLY ASSIGNED	TOTAL ASSIGNED PER PARTY
AT&T	840	0	840
BT PLC	300	0	300
CAPWIRE	2	0	2
CWHK	240	0	240
DBP	60	0	60
ETPI	2	0	2
FT	60	0	60
FTCC	60	0	60
IDC	120	0	120
ITALCABLE	30	0	30
ITDC	74	0	74
ITJ	60	0	60
JTB	4	0	4
KDD	480	0	480
KTA	45	0	45
MCII	270	0	270
MCL	210	0	210
NPTT	30	0	30
OTC	3374	288	3662
OTI	6	0	6
PHILCOM	45	0	45
PLDT	60	0	60
STM	105	0	105
TAS	90	0	90
TCNZ	179	10	189
TELEGLOBE	180	0	180
TRT	30	0	30
US SPRINT	120	0	120
WORLDCOM	30	0	30
TOTAL	7106	298	7404

GRAND TOTAL (Half Interests in MAUOs) 7404


PACIFIC REGION
INTEGRATED COMMON CARRIER CABLE NETWORK
Canada
USA
HAW-5
HAW-4
Hawaii
PacRimEast
Tasman-2
New Zealand
TPC-4
TPC-3
PacRimWest
Australia
Guam
G-P-T
Japan
H-J-K
Taiwan
Philippines
B-M-P
Kota Kinabalu
Brunei
Korea
Kyutai
ASPAC
Malaysia
S-B
Hontai-2
Hong Kong
Singapore
Kuantan

FOOTNOTES

[1] By letter dated June 20, 1990 the Commission approved the *pro forma* transfer of control and assignment of licenses from FTCC to TRT/FTC. The transaction was consummated on June 29, 1990, which resulted in TRT/FTC as the sole surviving carrier. *See* File Nos. CSG-90-027-(5)AL and I-T-C-90-067-TC.

[2] All applicants initially may not be certified to serve directly all territories that the facilities covered by the Joint Application are capable of serving. Each individual applicant proposing extensions of its services into such territories by means of the PacRimWest facilities will seek such appropriate authorization as may be required when it proposes to activate the facilities.

[3] Although the supply contracts for PacRimWest have not been awarded by the PacRimWest Procurement Group, we expect AT&T to be awarded a contract to supply a portion of Segment B of the cable system.

[4] A MAUO is the Minimum Assignable Unit of Ownership and provides an equivalent digital channel operating at 64,000 bits per second and an additional 9,684,656 bits per second for multiplexing.

[5] *See* Appendix 4. Today, we also grant the Joint Applicants' separate requests to construct and operate the HAW-5 and PacRimEast cable systems. The Tasman-2 cable will be considered at a later date.

[6] The cost per half-MAUO will further decrease as the Reserve Capacity is utilized by increasing the Notional Capacity. The Notional Capacity is that portion of the Design Capacity of PacRimWest has been assigned to existing PacRimWest owners. The Reserve Capacity is the remaining capacity between the Design Capacity and the current Notional Capacity. The Reserve Capacity is held collectively by the co-owners common in undivided shares in the same proportions as their percentage interests shown in Appendix 2, Schedule C. The PacRimWest Notional Capacity may be increased at the request of any co-owner. When the Notional Capacity reaches design capacity, the cost per half-MAUO will be approximately $18,700.

[7] In a separate decision, we also grant the Joint Applicants' request for a cable landing license in File No. S-C-L-90-005 pursuant to the Cable Landing License Act.

[8] *AT&T et al., (TAT-7 Order)*, 73 F.C.C. 2d 248, 256 (1979).

[9] *See, e.g., AT & T et al. (TAT-9 Order)*, 4 FCC Rcd 1129, 1131 (Com. Car. Bur. 1988). *See also Policies to be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs during the Period 1981-1985 (POR Planning)*, 102 FCC 2d 353, 355 (1985).

[10] In our *TPC-4 Decision*, we stated that in a price caps environment as detailed analyses as were traditionally undertaken with respect to circuit demand, facility capacity and facility costs are no longer necessary in reviewing AT&T's participation in the construction of submarine cable facilities. 4 FCC Rcd at 8046.

[11] *Id.*

[12] The estimated cost for a 64 Kbit/s half-circuit in the Hawaii-Guam section of TPC-3 is $20,441. If the Notional Capacity of PacRimWest approaches the design capacity, the total cost for a digital 64 Kbit/s half-circuit between Hawaii and Guam via TPC-3 and between Guam and Australia via PacRimWest would decrease to $39,141, approximately 43% of the cost of the ANZCAN analog 4 kHz half-circuit.

[13] *See North Atlantic Facilities Planning*, 3 FCC Rcd at 3986; *All America Cable and Radio Inc., et. al.*, 67 FCC 2d 451, 469 (1978).

[14] *North Atlantic Facilities Planning*, 3 FCC Rcd at 3987.

[15] PacRimEast will employ the latest 1.55 micron laser and 565 Mbit/s technology. The 1.55 micron technology reduces the number of repeaters that would have been required with a 1.3 micron laser technology. The reduced number of repeaters, in turn, results in cost savings.

[16] *North Atlantic Facilities Planning*, 3 FCC Rcd at 3989.

[17] *See North Atlantic Facilities Planning*, 3 FCC Rcd at 3989.

[18] *FTC Communications, Inc.*, 4 FCC Rcd 5633 (Com. Car. Bur. 1989) (*FTCC Ruling); recon. denied*, 5 FCC Rcd 3323 (Com. Car. Bur. 1990) (*FTCC Reconsideration Order).*

[19] *See supra* footnote 1.

[20] *FTC Communications, Inc.*, 5 FCC Rcd 3323 (Com. Car. Bur. 1990).

[21] *See* Joint Application at p. 17.

[22] *See supra* n. 1.

[23] *See International Carrier Policies*, 102 FCC 2d 812, 822, 832 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-508

In re Applications of

DANNY M. WATSON (hereafter "Watson") File No. BPH-880601NA

HOMETOWN BROADCASTING OF GREENFIELD, INC. (hereafter "Hometown") File No. BPH-880602MW

For Construction Permit
for a New FM Station
in Greenfield, Ohio
Channel 248A (97.5 MHz)

HEARING DESIGNATION ORDER

Adopted: October 11, 1990; Released: December 6, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Watson*. Watson petitioned for leave to amend his application on June 19, 1989. The accompanying amendment was filed after September 8, 1988, the last day for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

3. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Watson IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

7. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-86

In re Applications of

CHANNEL 32 BROADCASTING COMPANY	File No. BPCT-861215KS
MID-CONTINENT COMMUNICATIONS, INC.	File No. BPCT-8612162K
KANSAS CITY SKYWAVE, INC.	File No. BPCT-861216K2
T.V. 32, INC.	File No. BPCT-861216K4
HOLT LIMITED PARTNERSHIP	File No. BPCT-861216K7
KANSAS CITY TELEVISION, LTD. (KZKC(TV))	File No. BPCT-861216K8

For Construction Permit for New Television Station, Channel 32, Kansas City, Missouri

Appearances

Timothy K. Brady on behalf of Channel 32 Broadcasting Company; *John R. Wilner* and *Rebecca L. Dorch* on behalf of Mid-Continent Communications Inc.; *Donald J. Evans* and *William D. Goddard* on behalf of Kansas City Skywave, Inc.; *Ann C. Farhat* on behalf of T.V. 32, Inc.; *Jerrold Miller* on behalf of Holt Limited Partnership; and, *Joseph A. Godles* and *Howard M. Liberman* on behalf of Kansas City Television, Ltd. (KZKC(TV)).

DECISION

Adopted: October 26, 1990; Released: December 10, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. Nearly four years ago, the six captioned applicants (and eight others whose applications were subsequently dismissed) filed for authority to construct and operate a new UHF television facility on Channel 32 at Kansas City, Missouri. The *Hearing Designation Order* (HDO), 2 FCC Rcd 2162, was released April 14, 1987. Hearing sessions were held in December 1987 and July 1988, and the *Initial Decision* (I.D.) of Administrative Law Judge Joseph P. Gonzalez (ALJ) was released March 23, 1990, *see* 5 FCC Rcd 1796 (1990). Exceptions to the I.D. were filed with the Review Board by all remaining parties on May 18, 1990 (subsequent to granted extensions of time), and the last reply pleading was filed June 1, 1990. Oral Argument was heard on September 28, 1990, and the parties were afforded an additional period in which to attempt to settle this proceeding; however, on October 12, 1990, the applicants reported to the Board that they were unable to reach a settlement.

2. In addition to the standard comparative issue (including comparative coverage of each applicant), and an air hazard issue (specified and subsequently resolved in favor of every applicant), the hearing before the ALJ was also heard on a Section 73.685(a) issue (principal city of license signal coverage, 47 CFR § 73.685(a)), to determine whether circumstances existed which would warrant waiver of that provision of the Commission's Rules with respect to the applications of Channel 32, Inc. (Channel 32), Mid-Continent Communications, Inc. (Mid-Continent), and Kansas City Television, Ltd. (KZKC). The ALJ ultimately determined that, whereas Channel 32 was entitled to a waiver, Mid-Continent and KZKC were not, and must therefore be disqualified. (The HDO indicated that the application of KZKC was not for a new facility, but for modification of channel of operation of a licensed facility).

3. Based upon our review of the entire record below, the exceptions and replies filed by the applicants, and having heard oral argument, the Board affirms the ALJ's award of the construction permit here to T.V. 32, Inc. (T.V. 32), as modified herein.

COMPARATIVE COVERAGE

4. The record is uncontroverted that only three of the captioned applicants, Mid-Continent, Kansas City Skywave, Inc. (Skywave), and T.V. 32, propose to provide new first (and second) television service to certain areas and populations. More specifically, the Joint Engineering Exhibit (to which no exceptions have been filed by any party)[1] reflects that Mid-Continent will provide *first* television service ("white area" coverage) to 16,878 persons in a 1,279 sq. km. area; Skywave to 7,378 persons in a 313 sq. km. area; and T.V. 32 to 6,737 persons in an area of 249 sq. km. Only these applicants will also provide a *second* television service ("gray area" coverage) to, respectively, 6,360 persons in a 609 sq. km. area; 4,630 persons in an area of 117 sq.km.; and 4,705 persons in an area of 111 sq. km.

5. However, the ALJ determined that Mid-Continent was not entitled to its requested waiver of 47 CFR § 73.685(a). That provision requires that applicants for a new UHF television facility must select a proposed transmitter/tower site according, *inter alia*, to the following:

> The transmitter location shall be chosen so that, on the basis of the effective radiated power and antenna height above average terrain employed, the following minimum field strength in decibels above one microvolt per meter (dBu) will be provided over the entire principal community to be served [for UHF channels 14-69]: 80 dBu.

6. The ALJ found that Mid-Continent would serve only 429,992 persons within its 80 dBu contour out of a total population (within the city limits of Kansas City) of 448,159 persons, and only 216 square miles out of a total principal community area of 309 square miles. Mid-Continent's 80 dBu contour, therefore, would fail to provide service to 18,167 Kansas City residents within an area of 93 square miles, representing a total coverage of only 70% of the city's area (and 96% of its population).

7. Mid-Continent's waiver request was engendered by its desire to broadcast from the existing FM transmitting tower of KCFX(FM) at Harrisonville, Missouri, with an increase in the height of that tower to 1,033 feet (314.9 meters) above ground. Mid-Continent's principals did discuss the possibility of amending its application to specify a new antenna site (Tr. 437-439), and a Mid-Continent principal (Robert Wheeler) testified that the corporation had considered moving to other sites because Mid-Continent was aware that other applicants had, in fact, initially selected sites that did not require a waiver of 47 CFR §73.685(a) (Tr. 438-9). However, Mid-Continent's engineer, Alvin H. Andrus, recommended that Mid-Continent retain its original site, and that it pursue a waiver of 47 CFR §73.685(a) (Tr.438). Thus, Mid-Continent's Board of Directors made the decision not to amend its application to specify a new antenna site (Tr. 438, 727). Andrus stated that the reason for his recommendation not to move to one of the sites selected by the other applicants was his belief that the other applicants could not ultimately obtain either FAA or local zoning approval for their respective proposals (Tr. 716). But, Andrus admitted that he did not consult with the FAA regarding these other sites (Tr. 716), nor did he contact an air hazard specialist to evaluate the situation (Tr. 750). Furthermore, he testified that he had no independent knowledge of the zoning classifications for the other sites (Tr. 719, 742). Andrus stated that he "assumed" that Mid-Continent's proposal would not require zoning action (Tr. 720), but admitted that he had no specific knowledge as to whether its proposal to increase the height of the existing tower above 1,000 feet would have any impact on such zoning ordinances (Tr. 720).

8. The ALJ also determined that a potential comparative advantage from service to "underserved" areas to the south of Kansas City, Missouri was a "definite factor" in Mid-Continent's decision to remain at its proposed site. Mid-Continent's Directors believed that service to these "underserved" areas would make Mid-Continent's application "unique" and, therefore, place it in a more favorable comparative position (Tr. 442). Moreover, Mid-Continent wagered that this aspect of its proposal would also make it "more likely" that its waiver request would be granted (Tr. 438-442). In light of the foregoing, the ALJ concluded that Mid-Continent was not entitled to waiver of 47 CFR § 73.685(a), and was therefore disqualified.

9. With respect to the other two applicants (Skywave and T.V. 32) proposing to provide "white area" television service, the ALJ determined: (1) that Skywave was entitled to waiver of 47 CFR § 73.685(a) (*see Memorandum Opinion and Order*, FCC 87M-2310, released September 23, 1987), because as a result of an amendment to reduce its tower height (necessary to secure a determination of no hazard from the FAA), it would fail to provide requisite 80 dBu coverage to only 3.8 sq. miles (or 1.2% of the land area) of Kansas City;[2] and (2) that T.V. 32 was similarly entitled to a waiver because its revised proposal failed to encompass only 0.68% of the city of license, in an area containing virtually no population whatsoever. *See Order*, FCC 87- 2314, released September 23, 1987. No opposition was filed to either of these applicants' revised proposals, and no exceptions pertaining thereto have been filed with the Board.

10. *Discussion re : Mid-Continent*: Mid-Continent claims that the ALJ should have granted its waiver because, *inter alia*, "in the FM Service, the Commission routinely . . . grants waivers of the city grade signal rules where applicants . . . will provide service to only 80% of the community of license" (Exceptions at 10), and that "there is no factual or legal basis for distinguishing between television and FM broadcast service . . . [and this waiver standard] is illogical when waivers are automatically granted in the 'local' FM broadcast service for 20% coverage shortfalls" (*id.*, at 12). However, Mid-Continent fails to reflect that the referenced FM service waivers to "80% of the community of license" relate only to the *area* of the proposed city of license, not population. As noted in *A. B. C. D. Broadcasting Company*, 2 FCC Rcd 6551, 6552 (1981) (emphasis added):

> The FM Branch does not require waiver [of its principal city of license coverage requirements] unless the proposed [70 dBu "city grade" service] coverage falls below *80 % of the area* of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920-HVT).

See also Sue A. Underwood and Brenda Stroud, 3 FCC Rcd 153, 156 (1988). Indeed, Mid-Continent concedes that, with respect to population shortfalls from proposed commercial television facilities, "the Commission has historically applied a stringent *de minimis* shortfall standard. *See e.g. WSTE-TV, Inc.*, 75 FCC 2d 52, 62 (1979) (waiver granted for 2.9% population coverage shortfall); *Pappas Telecasting, Inc.*, 52 RR 2d 1495, 1497-98 (Rev. Bd. 1983) [same]." (Exceptions at 11.) Mid-Continent admits that its proposed facility would provide the requisite 80 dBu signal coverage *to only 70 %* of the *area* of Kansas City (10% below the FM waiver standard it relies upon here). Thus, even if the FM waiver standard were applicable here (which it is not), Mid-Continent would still fall short of the showing required. A request for waiver of the Commission's Rules confronts a "high hurdle," because an applicant must demonstrate in a clear, particularized, and factually-grounded manner (1) that it is otherwise unable to meet the strict requirements of the rule from which waiver is sought; (2) that such a waiver would be in the public interest; and (3) that such a waiver would not undermine the policy embodied by the rule. *See Pappas Telecasting, Inc., supra* ; *WAIT Radio v. FCC*, 418 F. 2d 1153, 1156-1157 (D.C. Cir. 1969). Mid-Continent, in electing to "fight rather than switch," has failed to make these required showings. Its purported "first service" superiority is obtained only at the expense of a large area of the proposed city of license. As noted in *Clay Television Inc.*, 95 FCC 2d 1167, 1172 (Rev. Bd. 1983), "[a]lmost any applicant could service more people if it ignored our technical requirements; that is no feat." Mid-Continent's election to seek to serve more persons, rather than to comply with the principal city coverage rule, thus inverting the priorities of the rule, summons no basis for

a waiver. *See generally Northeast Cellular Telephone Co., L. P. v. FCC*, _____ F.2d _____, 67 RR 2d 761 (D.C. Cir. 1990). We agree with the ALJ that Mid-Continent's request for waiver of 47 CFR §73.685(a) must be denied. As a result, it is disqualified.

11. Conversely, no objections or exceptions have been filed with respect to the *de minimis* waivers of Section 73.685(a) granted to Skywave and T.V. 32. Thus, they are the only remaining qualified applicants proposing to provide first service, or "white area", coverage. In *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3951 (Rev. Bd. 1988), the Board held:

> [I]n light of the long-standing imperative of the Commission contained in its *Sixth Report and Order*, [41 FCC 148, 167 (1952)] ("Priority No. 1: To provide at least one television service to all parts of the United States"), and the significant differences in the coverage areas proposed by the various applicants, this proceeding will dispositively turn on consideration of the best comparative applicant providing "first-service" (or "white-area" coverage) to the greatest number of persons . . . . *RAM Enterprises*, 57 FCC 2d 844 (Rev. Bd. 1976) (coverage preference including service to a substantial number of persons who did not have any such service outweighs both diversification and integration preferences), *review denied*, FCC 76-597, released June 24, 1976, *reopening denied*, FCC 77-36, released January 12, 1977.

12. In affirming the Board's award of a "white area" coverage preference, the Commission, in *Washoe Shoshone Broadcasting*, 5 FCC Rcd 5561, 5564 (1990), declared (footnote omitted):

> The decisive coverage advantage awarded [the prevailing applicant] by the ALJ and the Board is supported by Commission precedent. In *RAM Enterprises*, [*supra*], a substantial comparative coverage preference was held to outweigh diversification and integration preferences, where the winner would provide a first service to 4,938 persons daytime and 10,314 persons nighttime who would not be served by the other applicant. Similarly, in *FBC, Inc.*, 95 FCC 2d 256, 260-62 (Rev. Bd. 1983), *recon. denied*, 96 FCC 2d 976 (1984), *review denied*, FCC 85-303 (Jun. 14, 1985), a substantial coverage preference was held to outweigh an integration preference where the winner would provide a first television service to 2,300 persons, a second service to 355 persons, and third and fourth services to about 14,000 persons who would not be served by the other applicant. *See also 62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1774 ¶ 35 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 830 (1990), where the winning applicant was awarded a "very strong" preference for proposing a first television service to 3,408 persons and a second service to 810 persons who would not be served by the other applicants. Thus [the prevailing applicant] is entitled to a substantial preference sufficient to overcome [its competitors'] integration proposals, even if [the winner] were awarded no credit for integration . . . . Citing the *Sixth Report and Order*, 41 FCC 148, 167 (1952), we said that service to white areas, the "provision of at least one television service to all parts of the United States is of the highest priority" in the Commission's frequency allocation scheme. *Television Channel Assignments* at 1582 . . . . Furthermore, as a matter of policy, service to white areas is of paramount importance in licensing television stations. Therefore, we reaffirm the policy determinations in *RAM Enterprises* and *FBC, Inc.* Under the circumstances of this case, the preference for [the winner's] service to white areas outweighs [its competitors'] integration showing and is decisive. Accordingly, we agree with . . . the ALJ and the Board that [the winner] is entitled to a substantial and decisive preference for its proposed white area service.

13. In light of the foregoing, Skywave and T.V. 32 hold a dispositive comparative advantage. The remaining applicants, Channel 32, Holt Limited Partnership (Holt), and KZKC,[3] none of which propose *any* new first (or second) television service (and have not excepted to this determination), are effectively eliminated on a comparative basis. However, as between Skywave and T.V. 32, their proposals to provide new first (and second) television service are substantially equal (*i.e.*, Skywave proposes a first service to a population of 7,378 and second service to 4,630 persons *versus* T.V. 32's first service to a population of 6,737 and second service to 4,705 persons). Thus, we must address the other comparative attributes of these two applicants to determine the applicant best-qualified to receive the construction permit here. *See Washoe Shoshone*, 3 FCC Rcd at 3951-3952.

KANSAS CITY SKYWAVE, INC.

14. Skywave is an Indiana corporation consisting of "common voting" and "non-voting preferred" stock. At the time Skywave filed its application, 51% of the common voting stock was held by Brenda Williams, President and Director, and 49% by Linda Cooper, Secretary/Treasurer. However, another corporation, Skywave Communications Corp. (SCC), owned all of the issued non-voting preferred stock (as well as 80% of the equity of Skywave). Williams thus owned only 10.2% of the equity of Skywave, and Cooper owns only a 9.8% equity interest. Subsequent to the closing of the record, but before issuance of the I.D., Williams died. Her common voting stock was converted to non-voting stock, and devolved to her heirs. *See* I.D., para. 51 & n. 3.

15. The ALJ found that Cooper, a Black female, proposes to work full-time as Station Manager; and, before Williams' demise, Cooper intended to serve directly under Williams' supervision, with her primary responsibility the business and administrative affairs of the station. The station's Sales Manager would report directly to Cooper, and she would have immediate responsibility for staffing and personnnel practices (including EEO complaints). Cooper would also be responsible for community relations and the ascertainment of community needs, and Cooper proposed to work initially with Williams in establishing station policies and developing programming priorities. Cooper has resided continuously in Kansas City, Missouri since 1977, and will continue to do so if Skywave is the successful applicant (I.D., paras. 56-57).

16. However, the ALJ concluded that Skywave's Articles of Incorporation provide that the non-voting shareholder (SCC) may "put" its stock to Skywave at "fair

market value" at any time after July 1, 1991. If Skywave elects not to purchase the stock, it then may be converted to common stock solely at the option of SCC (T.V. 32, Exh. 5), thus giving it 80% of the voting control of Skywave. While Williams testified at hearing that, if the stock were "put" to Skywave, it would be her "intention" to direct Skywave to purchase the stock, she admitted that the ability to do so would be dependent on her (and Cooper's) financial circumstances at the time. She also conceded that a significant amount of money would be required to purchase the stock (Tr. 1189-91, 1141). Although she agreed that the purchase price for the stock would be based on the "fair market value" of television stations in the Kansas City area (Tr. 1089-90), Williams acknowledged that she did not have a "clear grasp" of such values of television stations in Kansas City (Tr. 1089-90). It is also noteworthy that Williams and Cooper's total financial commitment to Skywave has not exceeded $1,000 (I.D., paras. 59-60).

17. The ALJ also determined that there was no evidence that SCC's non-voting shares would not be converted. Rather, the ALJ declared, "there is a very strong presumption" raised that Cooper (now the sole voting shareholder), will not, in fact, be able to purchase the shares in the near future, and that SCC, on July 1, 1991, will be able to convert its shares to voting stock, thereby reducing Cooper's actual voting share in Skywave to 9.8%. Accordingly, the ALJ determined that SCC's 80% equity interest must be treated as an "active" interest in Skywave, and that "Cooper is thereby rendered a minority non-voting shareholder with little or no ability to manage the proposed station or to participate in policy making for the station" (I.D., para. 61).

18. The ALJ also concluded that the evidence demonstrated that SCC has been the driving force behind Skywave. All of the major decisions with respect to Skywave were made by SCC principals, and such decisions occurred before Williams and Cooper joined the corporation. Williams and Cooper were merely presented with a package involving a 20/80 percent equity split by SCC, and they agreed to serve as voting shareholders. SCC selected the lending institution (Tr. 1027, 1179), and received "commitments" for all the necessary financing (Tr. 1184). The incorporation of Skywave (Tr. 1086), the selections of the state of its incorporation (Tr. 1023), as well as its principal place of business, resident agent and engineering firm were all made by an SCC principal (Tr. 1029-1030, 1040). Although Williams did have a telephone conversation with the owner of Skywave's proposed antenna site, the site owner had already agreed to make the property available and had sent a letter to that effect to another principal of SCC (Tr. 1039, 1051; T.V. 32, Exh. 8). Selection of corporate counsel as well as communications counsel was also made by SCC, without any input from Williams or Cooper. Neither Cooper nor Williams were involved in the preparation of Skywave's corporate documents or (in any meaningful way) the preparation of its application (Tr. 1129, 1044-1045). Neither Williams nor Cooper was involved in developing a business plan or budget for Skywave's project (Tr. 1081). The only significant role played by Williams was the writing of checks for the corporation and the record does not to disclose *any* significant involvement on the part of Cooper. Furthermore, neither Skywave's Articles of Incorporation, nor its By-Laws, contain any specific provisions limiting the activities of the corporation's non-voting shareholder, SCC (T.V. 32, Exhs. 5, 7 and 11), and Williams was unaware of the existence of any other documents which impose restraints on the activities of SCC (Tr. 1099) (I.D., paras 61-62). T.V. 32 also observes that the non-voting shareholders met Cooper and Williams only once at the Kansas City airport (T.V. 32 Exceptions at n. 6).

19. While Cooper proposed to be integrated into the station on a full-time basis as the station's Station Manager, the ALJ believed that "it [is] extremely doubtful that she will serve in that position in view of her projected minority voting status and her failure to assume an active role in the prosecution of this application" (I.D., para. 63). Further, the ALJ expressed his doubt that, had Williams lived, she would have served as General Manager, or exerted any degree of control, in light of her minority voting status. Accordingly, the ALJ concluded that Skywave was not entitled to any quantitative integration credit for Williams' and Cooper's proposals to serve as General Manager and Station Manager, respectively. *Id.*

20. *Discussion re: Skywave*: Skywave claims that it is a *bona fide* two-tiered corporation, and that its integration proposal should be credited. Skywave also argues that the conversion rights available to SCC are of no moment because those rights are "extinguishable," and there is no evidence these rights will, in fact, be exercised (Skywave Exceptions at pp. 8-19).

21. In *Signal Ministries, Inc.*, 104 FCC 2d 1481 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1259 (1987), *aff'd per judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988), the Board rehearsed the long-standing doctrine that "[w]here . . . it is *unlikely* that a convertible interest will be exercised, the potential ownership interest will have no impact on the comparative analysis." 104 FCC 2d at 1491 (emphasis added) (citing *Washington's Christian TV Outreach, Inc.*, 99 FCC 2d 395, 410-414 (Rev. Bd. 1984) (subsequent affirmances omitted)). In *Signal Ministries* and *Washington's Christian*, we did forbear from attributing equity interests convertible to active status because the preponderance of record evidence in each specific case persuaded us that conversion was unlikely for the (then) forseeable future. Conversely, in *Radio Laredo, Inc.*, 87 FCC 2d 353, 354 (Rev. Bd. 1981) (subsequent affirmances omitted), the Board affirmed the attribution of an option-holder's 20% equity potential where the evidence did *not* suggest an unlikelihood of conversion.

22. In its *Attribution of Ownership Interests*, 97 FCC 2d 997, 1021-1022 (1984), the Commission appeared somewhat less stringent on the cognizability of convertible interests, and declared that such interests (including, but not limited to, non-voting stock, warrants and debentures) would be deemed non-cognizable "[i]f the contingency upon which the conversion right rests is beyond the control of the holder . . . ." *Id.* (internal quotes omitted). Following that line in *Doylan Forney*, 3 FCC Rcd 6330, 6337 (Rev. Bd. 1988), the Board, citing *Attribution*, did not attribute the interests of a warrant-holder (Broadcap); but the Commission's recent affirmation of that decision (5 FCC Rcd 5423 (1990)) modified our reliance on *Attribution* and upheld our non-cognizability determination only upon the *Signal Ministries* standard that "Broadcap is not likely to exercise the warrants it holds," based upon the particular evidence in *Doylan Forney*.

23. On the other hand, and with respect to another applicant in *Doylan Forney*, the Commission observed (5 FCC Rcd at 5424):

> By virtue of their power to take the station from the general partners without their consent, the limited partners have more than a purely passive interest. For example, in exercise of their prerogative, they could sell all of the partnership assets to themselves for a negligible price, thereby stripping the general partners of their share of the assets without recompense. The possession of power over the general partners distinguishes this case from *Chester Associates*, 62 RR 2d 1315 (Rev. Bd. 1987), and *Independent Masters, Ltd.*, 104 FCC 2d 178 (Rev. Bd. 1986), cited by [the losing applicant] where the Board found that the role and intent of the limited partners were consistent with the Commission's attribution requirements although the specific language of the limited partnership agreements did not include the provisions required in *Attribution Reconsideration*. Here, we cannot make the same finding about the role and intent of the limited partners. The partnership agreement gives the limited partners such leverage over the general partners as to belie any contention that the latter are insulated from influence.

24. Here, the record suggests the likelihood that SCC will convert its 80% equity into voting stock. There is no evidence whatever that Cooper will be in a financial position to counter any SCC "put," which could come as early as July 1991. *Compare Signal Ministries* ; *cf. George Henry Clay*, 5 FCC Rcd 317, 319-320 (Rev. Bd. 1989) (integration credit denied where principal unable to demonstrate likelihood of future equity ownership). Further, SCC has shown no propensity to be merely a passive investor; indeed, the ALJ found SCC to be the "driving force" in Skywave. These two considerations, in confluence, militate most strongly against the award of full 100% integration credit to Skywave. That applicant has not carried its burden under this aspect of the standard comparative issue, and we hold that it is entitled, at most, to 9.8% integration credit for Cooper's fractional equity interest. [4]

25. Therefore, and even assuming Skywave not to be an outright sham (*see supra* note 4), it would be comparatively inferior to T.V. 32, which (as we next discuss) would be entitled, at minimum, to 50% credit under the important criterion of integration of equity ownership into actual management.

T.V. 32, INC.

26. T.V. 32 is a Kansas corporation with one class of stock (T.V. 32, Exh. 1). Robert B. Liepold is the President and Treasurer, and owns 15,000 shares of voting stock representing 60% of the issued and outstanding shares. Thomas B. Jones is Vice President and Secretary, and owns 10,000 shares of voting stock (40%). Liepold and Jones constitute the entire Board of Directors. Liepold is the proposed full-time Chief Executive Officer (T.V. 32, Exh. 2 at 5). He has resided in the Kansas City area between 1969 and 1974 and from 1978 to the present (T.V. 32, Exh. 1), and has been active in civic affairs. Jones proposes to be the station's full-time General Manager (T.V. 32, Exh. 3 at 5). His duties will include attending to the details of the station's operations including immediate oversight of programming, engineering, sales, and other operating departments. He will also be responsible for the administration of employment practices and intern programs (T.V. 32, Exh. 2 at 5). Jones will move to Kansas City, Missouri in the event that T.V. 32 is the successful applicant (T.V. 32, Exh. 3 at 5).

27. Jones also has extensive broadcast experience. From 1952-1959, he was employed at the Washington Post stations then co-owned by CBS (T.V. 32, Exh. 3 at 1). He served, progressively, as a floor director, cameraman, director and producer of programs. He then became Program Director of WTOP-TV, and he also assumed film and program purchasing duties for the Post's Jacksonville, Florida television station. Between 1959-1961, Jones was Operations Director of station WJIM-TV, Lansing, Michigan; from 1961-1967, he served as Operations Director of a Binghamton, New York AM-FM-TV facility; then as the Operations Director of a Philadelphia, Pennsylvania AM-FM-TV facility; and, finally, as Program Director for the entire group of stations operating out of headquarters in Philadelphia, Pennsylvania. Between 1968 and 1974, Jones returned to station WJIM-TV, Lansing, Michigan where he served as Station Manager. From 1975-1978, Jones served as a communications consultant in Lansing, Michigan, and between 1979-1984 as a consultant for an applicant for a new UHF television station in Lansing, Michigan. He became General Manager of that station when it signed on the air in 1982, and he continued in that capacity until shortly before sale of the station in 1985. Since that time, Jones has returned to consulting in broadcast (and cellular telephone) matters (I.D., para. 71).

28. The ALJ also concluded that neither T.V. 32, nor Liepold, has any cognizable interest in any medium of mass communications. Jones has a 10% non-voting shareholder interest in Mid-Michigan FM, Inc., whose application for a new FM radio station to operate on Channel 243A at Dewitt, Michigan was granted (pursuant to a settlement agreement). *See Memorandum Opinion and Order*, FCC 89M-2208, released September 6, 1989 (I.D., para. 72.)

29. However, the ALJ held that T.V. 32 has a "potential liability" in the form of convertible debentures. These debentures represent values of $50,000 to Gene A. Bechtel; $50,000 to Joseph W. Kennedy; and $25,000 to James A. Olson (T.V. 32, Exh. 1; Memorandum of Agreement at 2; Tr. 1697). Seven years after the commencement of operations, the debentures are payable with 6% interest, or are convertible to common voting stock at the option of the holders. Bechtel and Kennedy would each receive a 20% interest in the voting stock of T.V. 32, and Olson 10%. However, the debentures are convertible earlier in the event of sale of the proposed station, solely at the discretion of the debenture holders (T.V. 32, Exh. 1; Memorandum of Agreement at 3). Thus, the ALJ believed that, if the debentures to be issued are converted to voting stock interests at the end of seven years, or if the facility is sold at any time, voting shareholders Liepold and Jones would be reduced to a combined 50% voting stock interest. The ALJ held that, because no evidence demonstrated that these debentures will not be converted, a voting stock interest must be attributed to each future debenture holder, and that the "likelihood that such options will be exercised is particularly strong here in light of the dominant roles played by the debenture holders in organizing

T.V. 32 and in prosecuting its application, as compared to the relatively small roles played both by Liepold and Jones." (I.D., para. 74.) Thus, the ALJ treated Bechtel, Kennedy, and Olson as if they were present voting equity owners, and held that "when so viewed, the claim of a 100% quantitative integration credit is unsupportable." Accordingly, for comparative purposes, T.V. 32 was found by the ALJ to be entitled only to 50% integration credit for its proposal to integrate Liepold and Jones. (I.D., para. 76.) Liepold's quantitative integration credit was qualitatively enhanced by his Kansas City residence, and (to a "slight to moderate degree") by his involvement in local civic affairs. Jones also received credit for his pledge to move to Kansas City in the event that T.V. 32 is the successful applicant, and for Jones' has extensive broadcast experience. *Id.*

30. In its Brief supporting the result of I.D., T.V. 32 argues that it should be awarded full 100% integration credit for Liepold and Jones, claiming that the "conversion rights" of the debenture holders do not arise for seven years subsequent to commencement of operation of the station. It also claims that T.V. 32 is bound to employ other unaffiliated corporate counsel, communications counsel, and an independent accounting firm after award of the construction permit. Skywave, Mid-Continent, and Holt have not excepted to the ALJ's comparative determinations as to T.V. 32. KZKC and Channel 32 argue that T.V. 32 is not entitled to any integration credit, claiming that T.V. 32 is, in essence, a "sham."

31. *Discussion re: T. V. 32*: We do not agree with the ALJ that the existence of the debenture rights is sufficient to reduce T.V. 32's integration credit to 50%. As noted earlier with respect to Skywave, the Board in *Signal Ministries, Inc., supra*, did not attribute the interests of convertible debenture holders because the evidence there demonstrated that such conversion was unlikely for the foreseeable future. We believe the same is true in this case.

32. Here, if the facility is constructed and operated as proposed, the Memorandum of Agreement between the only shareholders (Liepold and Jones) and the debenture holders provides that the debentures cannot be converted for at least seven years; thus, the debenture holders can have no ownership interest in the constructed and operating facility for at least that significant period of time (equal to one license term plus two years). This is too remote in time for current cognizability. *See Cleveland Television Corporation. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984) (no attribution where non-voting stock was convertible to voting stock only three years after date of issue). Moreover, T.V. 32's structure contrasts sharply with the Skywave/SCC arrangement which permits the vesting of majority ownership and control with SCC in just a matter of months.

33. As to the ALJ's conclusion that the debenture holders have played "dominant roles" in organizing and prosecuting T.V. 32's application, "compared to the relatively small roles played by both Liepold and Jones," *see I.D.*, para. 74, *Coast TV*, 5 FCC Rcd 2751, 2752-53 (1990) (footnotes omitted) holds that:

> [W]here a "passive" owner is shown to be materially involved in the applicant's activities after that owner has been held out as a passive investor, that owner's interest will be considered for comparative purposes. Where an applicant adopts an ownership structure under which a particular owner is to be a limited partner (or a non-voting stockholder), that owner's subsequent participation in any aspect of decisionmaking raises a question as to whether he will, in accordance with the applicant's ownership structure, have a passive, rather than an active, role in the management of the ongoing licensee . . . .
>
> In summary, where an owner has assumed an active role after the applicant has declared that that owner will be passive, that owner's equity interest will be attributed to the applicant for integration purposes regardless of the nature of the "passive" owner's involvement. In contrast, where an applicant adopts an ownership structure providing that a previously active owner will now have a passive role and thereafter adheres to that changed ownership structure without exception, the Commission ordinarily has reasonable assurance that the once active owner will not exercise any control or influence over the management of the ongoing licensee. Under those circumstances, we will not attribute the equity interest of a passive owner to the applicant for integration purposes even though that owner may have been active in initiating or financing the application before the applicant adopted an ownership structure specifying a passive role for that owner.

Here, however, there is no "two-tiered" limited partner/non-voting shareholder ownership structure; only the potential 50% ownership interest of the debenture holders at a distant point in time.

34. We also interject that, although T.V. 32's integration credit was not reduced because debenture-holder Bechtel's law firm continues to represent that applicant, the question arises as to whether Bechtel's potential interest must be attributed by virtue of the rule annunciated in *Clarification of Ownership Attribution*, 1 FCC Rcd 802, 804 (1986). There, the Commission considered the interests of counsel who provide legal services to an applicant, and clarified that (footnotes omitted):

> [T]he *Attribution Reconsideration Order* [*Memorandum Opinion and Order*, FCC 85-252, released June 24, 1985] unambiguously provides that the partnership agreement should bar an exempt limited partner from providing "any" services which materially relate to the media activities of the partnership. The petitioner's assertion that the scope of this provision does not encompass legal services, therefore, is at odds with the plain language of our *Attribution Reconsideration Order*. Moreover, in our view, it would be difficult to envision legal services that are more directly related to the media activities of the partnership than those concerning the licensing and operation of broadcasting entities . . . Moreover, we are unpersuaded that there is any policy reason which would justify an exemption for the legal services described in the motion. A partner whose contribution to the partnership is in the form of personal services and expertise rather than in the form of a financial investment is the antithesis of a passive investor. Indeed, it is virtually inevitable that such a partner will become actively involved in partnership affairs.

More recently, in *Magdalene Gunden Partnership*, 5 FCC Rcd 2509, 2510 (1990), the Commission further clarified and enlarged upon the aforecited attribution principle. Citing, with approval, *Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6130 (Rev. Bd. 1987), *aff'd* , FCC 88-232, released July 23, 1988, it held that "a limited partner may not escape attribution where acts uncharacteristic of a limited partner were carried out by his law firm but not [the lawyer] personally."

35. However, we will not consider Bechtel an active principle here for two reasons. First, and as we have already determined, Bechtel's convertible interest could not ripen for many years,[5] and until that time he has no interest whatever beyond his creditor status. Second, we will not extend *Ownership Attribution* principles beyond *Gunden* when it comes to attributing the interests of counsel (many of whom are "creditors" of an applicant in one form or another). And, even if we did attribute the potential interests of the debenture-holders and reduced T.V. 32's integration credit to 50%, it would still prevail easily over Skywave.

36. Finally, we reject the contention of KZKC and Channel 32 that T.V. 32's ownership structure is a sham. For all the record shows, T.V. 32's two voting shareholders, Liepold and Jones, are *bona fide* applicants and its debenture holders are adequately insulated from legal or *de facto* control. The facts here differ dramatically from the cases in which we have found ownership structures to be disingenuous. *Compare, e.g., Metroplex, supra* note 4; *Mableton Broadcasting Co., Inc.*, FCC 90R-99 (at paras. 3-13, and cases cited therein), released October 30, 1990. *See also Coast TV, supra*. The exceptors have pointed to nothing on the instant record that would allow us to totally discredit T.V. 32's ownership structure. With the insulation afforded the shareholders from the debenture holders by their Memorandum of Agreement, we hold that T.V. 32 is entitled to 100% integration credit. The only two voting shareholders (one of whom, Jones, has extensive broadcast experience) have demonstrated that they will, in fact, be in control of the day-to-day operation of the facility. Also, T.V. 32 has demonstrated that the debenture holders will not be retained in any professional capacity subsequent to issuance of the construction permit, and have contracted with Liepold and Jones not to have any contact regarding station operations. Thus, our review of the record, in its entirety, dictates that T.V. 32 is entitled to full integration credit for Jones and Liepold, enhanced by local residence, participation in civic activities, and broadcast experience. Weighed against the only other applicant (Skywave) proposing to provide first (and second) television service, T.V. 32 is the comparatively superior applicant. *See Washoe Shoshone, supra*.

CONCLUSIONS

37. With the disqualification of Mid-Continent and KZKC, only four applicants receive comparative consideration: Skywave, T.V. 32, Holt, and Channel 32. Because of the dispositive "white-area" coverage preferences awarded T.V. 32 and Skywave, Holt and Channel 32 cannot prevail. As between T.V. 32 and Skywave, T.V. 32 is, at minimum (*see supra* note 4), the preferred applicant on a comparative basis. Thus, its application for construction permit will be granted.

38. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend, purportedly filed by Kansas City Television Ltd. (KZKC Television, Inc.) on May 18, 1990, IS GRANTED, and the attached amendment IS ACCEPTED for reporting purposes only pursuant to 47 CFR §1.65; and,

39. IT IS FURTHER ORDERED, That the applications of Channel 32 Broadcasting Company (File No. BPCT-861215KS); Mid-Continent Communications, Inc. (File No. BPCT-8612162K); Kansas City Skywave, Inc. (File No. BPCT-861216K2); Holt Limited Partnership (File No. BPCT-861216K7); and Kansas City Television, Ltd. (File No. BPCT-861216K8), ARE DENIED, and that the application of T.V. 32, Inc. (File No. BPCT-861216K4) for a new UHF television facility to operate on Channel 32 at Kansas City, Missouri, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] T.V. 32 did not participate in the Joint Engineering Exhibit, opting to submit its own showing, including the use of translators to expand its "white area" coverage. However, no party has excepted to the Joint Exhibit's showing of areas and populations to be served by T.V. 32.

[2] In its comments supporting Skywave's waiver request, the Commission's Mass Media Bureau observed that virtually no persons resided in the area where there would be a coverage shortfall.

[3] KZKC is not a viable applicant and could not prevail in this proceeding for any of three reasons. First, even if it were not disqualified, it could not prevail on a comparative basis because it concedes that it does not provide any new first (or second) television service to any population or area. *See* paras. 11-13, *supra*. Second, the ALJ disqualified KZKC because it could not demonstrate that it was entitled to a waiver of 47 CFR §73.685(a). The ALJ found that KZKC proposes to top-mount its transmitting antenna on the existing tower of station KCFX(FM), Harrisonville, Missouri (KZKC Exh. 2, at 2). KZKC's expert witness, engineer John A. Lundin, testified that he believed that the KZKC's application is in "substantial compliance" with the intent of Section 73.685(a), and that a waiver is fully justified. He opined that locating the TV facility at that site would permit efficient utilization of the channel since it would allow operation with the maximum permitted effective radiated power, while at the same time avoiding the environmental and aeronautical hazard considerations that might attend the construction of a new tower. Lundin admitted, however, that there are other sites which would allow operation with maximum power and an effective antenna height of 318 meters (Tr. 1403); and that his environmental and aeronautical concerns were general in nature (Tr. 1403-04). However, it is undisputed that KZKC will furnish a city grade signal to only 96.5% of the population and 69.1% of the geographical area of Kansas City. It will not provide the required 80 dBu service to 15,468 persons (3.5% of the population) in an area of 97 square miles (30.9% of the area). As noted by the Bureau, these areas and populations are not *de minimis*, pursuant to FCC precedent.

Thus, as with respect to Mid-Continent, we agree with the ALJ that KZKC has failed to establish any valid public interest or equity considerations for selecting its proposed site or for granting a waiver of the Commission's city coverage rule. We note that Lundin, who testified in support of KZKC's waiver request, did not prepare KZKC's original application and has no first hand knowledge of the factors involved in the selection of KZKC's antenna site (Tr. 1402). KZKC freely chose to remain at its initially proposed antenna site, although it is not in substantial compliance with the requirements of Section 73.685(a) of the Rules. We hold that KZKC has not met its burden of proof that it would be in the public interest to grant a waiver of 47 CFR § 73.685(a). *See Pappas Telecasting* ; *WAIT Radio, supra.* On this basis alone, KZKC must be disqualified. Finally, we note that Kansas City Television, Ltd. (KCTL), the captioned applicant, and now former licensee of KZKC, is no longer a party to this proceeding as a result of its own actions. On August 22, 1989, KCTL filed FCC Form 314 ("Application for Consent to Assignment of Broadcast Station . . . License") on behalf of KCTL, Debtor-in-Possession, to assign the assets of KZKC to a new entity, KZKC Television, Inc. (KTI) (File No. BALCT-890822KF). The Commission granted this assignment application on January 31, 1990, and a closing was apparently held on February 9, 1990. None of these actions were timely reported in this proceeding. Subsequently, on May 18, 1990, KCTL (although no longer the licensee of KZKC) filed a Petition for Leave to Amend indicating, *for the first time*, that (1) KTI had acquired the assets of KCTL pursuant to a reorganization approved by a bankruptcy court; and (2) that KTI had subsequently filed (on April 20, 1990) yet *another* FCC Form 314, purporting to assign the assets of KZKC to another new entity, Kansas City TV 62 Limited Partnership (KCTLP). File No. BALCT-900420KE was assigned to this subsequent application. In this May 18, 1990 amendment the following statement is made (emphasis added):

> The application of Kansas City Television, Ltd., *formerly* the licensee of KZKC(TV) and *an applicant for a major change* in facilities (File No. BPCT-861216K8), is hereby amended in accordance with the attached materials, which contain information concerning the qualifications of: (1) KZKC Television, Inc., the new licensee of KZKC(TV); and (2) Kansas City TV 62 Limited Partnership, the proposed assignee of the license of KZKC(TV) (File No. BALCT-900420KE).

This amendment was filed (and executed) by an officer of the second licensee of KZKC (KTI), although Kansas City Television, Ltd. (the former licensee) purported to file the Petition for Leave to Amend and Amendment. Because KZKC has otherwise been disqualified, and has made two major changes in its ownership structure, KCTL (the captioned applicant in this proceeding) is no longer a viable applicant. *See* 47 CFR § 73.3572(b); *Tequesta Television, Inc.*, 2 FCC Rcd 41, 42 (1987). For all of the foregoing reasons, the application of KCTL shall not be considered further in this proceeding.

[4] But for the fact that Skywave is far inferior with respect to integration credit because of the attribution of SCC's convertible interest, we would likely find Skywave's entire ownership structure to be a sham. As the Commission observed in *Coast TV*, 4 FCC Rcd 1786, 1787 (1989):

> [S]ometimes an applicant may present a favorable formal structure on paper in order to gain a quantitative integration preference, but in reality that structure is not an accurate depiction of how the licensee's affairs will be managed. Thus, limited partners or non-voting stockholders, although nominally without influence over the applicant, may actually participate in or control the applicant's decision-making process. In those instances, the Commission disregards the applicant's formal ownership structure and treats the nominally passive owners (that is, non-voting stockholders or limited partners) as if they were active in the management of the applicant - and thus relevant to the Commission's integration analysis. *See e.g., Signal Ministries, Inc.*, 104 FCC 2d 1481, 1494-97 ¶¶ 15-16 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1259, 1259 ¶ 2 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988); *KIST Corp.*, 102 FCC 2d 288, 292 ¶ 9 (1985), *aff'd per curiam sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 2182 (1987); *Henderson Broadcasting Co.*, 63 FCC 2d 419, 424-26 ¶¶ 10-13 (Rev. Bd. 1977). *See also Cleveland Television Corp. v. FCC*, 732 F.2d 962, 969 (D.C. Cir. 1984).

See also V. O. B. Incorporated, FCC 90R-91, released October 17, 1990. And, as the Board observed in *Metroplex Communications*, Inc., 4 FCC Rcd 8149, 8159 (Rev. Bd. 1989), aff'd, 5 FCC Rcd 5610 (1990)):

> As is by now widespread knowledge, the Commission's relaxation of its ownership attribution rules, when conjoined with its various comparative preferences and the statutory amendment removing all monetary limits from applicant settlements in comparative licensing cases, has spawned a plague of "sham" applications which project a bogus two-tier ownership structure in order to skew the comparative mathematics. The recent rash of "sham" applications has been nearly without number, but illustrative variations of the ploy may be found in KIST Corp., 99 FCC 2d 173 (Rev. Bd. 1984), *modified*, 102 FCC 2d 288 (1985), *affirmed by judgment sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986); *N.E.O. Broadcasting Co.*, 103 FCC 2d 1031 (Rev. Bd. 1986), *review denied*, 1 FCC Rcd 380 (1986); *Pacific Television Ltd.*, 2 FCC Rcd 1101 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1700 (1988); *Tulsa Broadcasting Group*, 2 FCC Rcd 6124 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 4541 (1988); *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181 (Rev. Bd.), *recon. denied*, 1 FCC Rcd 1267 (Rev. Bd. 1986), *review granted in part and denied in part*, 2 FCC Rcd 6080 (1987), *aff'd by judgment sub nom. Spectron Broadcasting Corp. v. FCC*, 858 F.2d 744 (D.C. Cir. 1988); *Magdalene Gunden Partnership*, 2 FCC Rcd 5513 (Rev. Bd. 1987), *recon. denied*, 3 FCC Rcd 488 (Rev. Bd. 1988), *review denied*, 3 FCC Rcd 7186 (1988).

Given the totality of the evidence synopsized at paragraph 18, *supra*, the ALJ's view that Skywave is not a *bona fide* limited partnership appears well-founded. *See Royce International Broadcasting*, FCC 90-390, released November 27, 1990.

[5] We make nothing of the fact that the interests of the debenture-holders could ripen upon a decision to sell the station. It is clear that the Commission's attribution policies are transfixed on the ability to *control* an ongoing station; what happens upon sale (or thereafter) in terms of equity ownership is irrelevant to our comparative integration analysis.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-269

In re Applications of

DOROTHY O. SCHULZE and DEBORAH BRIGHAM, a General Partnership — File No. BPCT-850320KG

BLANCO COMMUNICATIONS LTD. — File No. BPCT-850320LC

For Construction Permit for
New Television Station, Channel 52,
Blanco, Texas

MEMORANDUM OPINION AND ORDER

Adopted: November 27, 1990; Released: December 10, 1990

By the Review Board: MARINO (Chairman), and ESBENSEN. Board Member BLUMENTHAL concurring in result.

1. Before the Review Board is an Appeal, filed November 8, 1990, by a former applicant in this proceeding, Opal Chadwell. Her appeal, filed pursuant to 47 CFR §1.301(a)(1), is from *Memorandum Opinion and Order*, FCC 89M-1568, released June 2, 1989, by the Presiding Officer (ALJ) dismissing Chadwell's application with prejudice.[1] The captioned applicants filed a Joint Opposition on November 21, 1990.

2. Section 1.301(c)(2) of the Commission's Rules, 47 CFR §1.301(c)(2), provides that any appeal from an order terminating an applicant's participation in a hearing proceeding must be filed "within 5 days after the order is released." *See e.g., WWOR-TV, Inc.*, 5 FCC Rcd 3768 (1990). Here, Chadwell's appeal was filed some 537 days subsequent to release of the *Order* at issue. Chadwell now argues that her application should be reinstated in this proceeding because, *inter alia*, "it has already been determined that Chadwell is a necessary participant . . . [and] that she be accorded the same rights" as the other applicants.[2]

3. We reject Chadwell's appeal as grossly untimely. *Sco-Kim, Inc.*, 90 FCC 2d 960, 961 (Rev. Bd. 1982), *review denied*, FCC 82-463, adopted October 21, 1982 (appeal dismissed where filed 28 days late); *Classic Vision, Inc.*, 1 FCC Rcd 1109 (Rev. Bd. 1986) (same, where filed "some six months" late). Nothing in Chadwell's appeal justifies her reinstatement as an applicant, and no adjudicatory process could survive the grant of an appeal filed one hundred times the number of days allotted for appellate consideration.[3] To reinstate Chadwell in this proceeding at this late date would make a mockery of the Commission's hearing processes and "wreak havoc with the adjudicatory process." *Sco-Kim, supra*. This we will not do.

4. ACCORDINGLY, IT IS ORDERED, That the Appeal filed by Opal Chadwell on November 8, 1990, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] The Commission remanded this proceeding to the ALJ on a financial qualifications issue against Chadwell on January 31, 1989. *See Opal Chadwell*, 4 FCC Rcd 1215, 1217 (1989) ("*Remand Order*"). Subsequently, in the *Order* at issue here, the ALJ, in dismissing Chadwell's application, stated (at paras. 4-8; footnotes omitted):

> The Presiding Officer responded to the Commission's concerns on February 8, 1989. *See* FCC 89M-422. He set a schedule for the remanded proceeding. As an integral part of that schedule, he directed the remanded discovery be initiated on or before March 10, 1989, and completed by May 10, 1989.
>
> On the March 10, 1989 deadline both [Schulze/Brigham and Blanco] initiated timely discovery. Each of them served motions for production of documents on Chadwell, and each signified that they would depose both Opal Chadwell and certain non-party individuals on April 25 and 26, 1989; namely, (1) Earl Chadwell; (2) Jim McCrocklin; (3) Georgia Dixon; (4) T.F. Burger; and (5) Ray Johnson. Chadwell neither opposed or commented upon the deposition notices.
>
> Chadwell didn't oppose or even comment on either [Schulze/Brigham's or Blanco's] motions to produce. So, on March 31, 1989, the Presiding Officer granted them. *See* FCC 89M-1032, and FCC 89M-1033. Chadwell was ordered to produce the pertinent documents on or before April 10, 1989. She didn't.
>
> She also failed to show up for her April 25, 1989 deposition. Moreover, she contacted the five prospective non-party deponents, and told them that they needn't appear for their depositions. They didn't, even though all of them had been legally subpoenaed. Thus she has unlawfully interfered with the lawful operation of the Commission's processes.
>
> On April 21, 1989, [Schulze/Brigham] moved to have Chadwell compelled to produce documents, and on April 25, 1989, [Blanco] followed suit. Again Chadwell neither opposed, nor commented on those motions, and they were granted. *See* FCC 89M-1403, released May 10, 1989, and FCC 89M-1416, released May 11, 1989. Chadwell was ordered to produce the pertinent documents on or before May 22, 1989. She didn't. Consequently, [Schulze/Brigham] filed this unopposed motion to dismiss.

[2] In its *Remand Order*, above, the Commission upheld the Board's earlier determination in *Opal Chadwell*, 2 FCC Rcd 5502 (Rev. Bd. 1987), that Schulze/Brigham and Blanco must be disqualified. However, in a subsequent opinion, *Dorothy O. Schulze and Deborah Brigham*, 5 FCC Rcd 3227 (1990), the Commission granted partial reconsideration of its *Remand Order* to the extent that Blanco would be permitted to introduce further evidence to impeach Chadwell's testimony at hearing that led to the disqualification of Blanco. More specifically, the Commission declared (5 FCC Rcd at 3229; footnotes omitted):

> Nevertheless, we believe that Blanco has justified pursuing the matter of Chadwell's credibility to a limited extent. We believe that this approach is warranted, because (1) Blanco did not have the opportunity to cross-examine Chadwell as to possible misrepresentations and abuse of process, as the rule contemplates, and (2) we do not think it fair to leave matters solely under Chadwell's control.
>
> We believe that the question of whether or not recent events undermine Chadwell's credibility vis-a-vis [Blanco principal] DuBose should be referred to the ALJ. The ALJ heard the witnesses and is therefore in the best position to determine in the first instance whether recent events alter their credibility. In this regard, Chadwell's failure to prosecute also occurred directly before the ALJ.
>
> Thus, the ALJ should give Blanco the opportunity to cross-examine Chadwell at hearing as to her financial showing and the reasons for her failure to prosecute. This cross-examination will also allow the ALJ to make additional demeanor findings. So that Blanco can prepare for the hearing session, the ALJ should permit Blanco to take the depositions of Chadwell and other relevant witnesses. The ALJ should also give Blanco the opportunity to subpoena relevant documents, including those authored by Chadwell, which could be introduced into evidence to impeach Chadwell's credibility consistent with the Federal Rules of Evidence (if Chadwell does not deny the documents' authenticity). *See Carter v. Hewitt*, 617 F.2d 961, 969-70 (3rd Cir. 1980).

The Commission also noted (*id.*, at n. 2):

> We recognize that in view of recent events, there is a risk that some individuals may not cooperate in these further proceedings. Appropriate remedies, however, are available. *See*, for example, 47 C.F.R. § 1.340 (use of courts to enforce a subpoena).

Despite the foregoing, Chadwell did nothing. In fact, as claimed by the joint opponents, Chadwell (and her husband, Earl), ignored subpoenas for both the production of documents and attendance at depositions to be held prior to the remanded hearing. Thus, on October 5, 1990, Blanco filed an Application for Order to Show Cause Why Subpoenas Should Not be Enforced with the United States District Court, Western District of Texas, Austin Division (Case No. A90-CA701). Chadwell's instant appeal followed on November 8, 1990. Subsequent to the issuance of a Show Cause Order by the District Court, and on the eve of the hearing to be held in Austin, Texas on this matter, Chadwell agreed to appear in Washington, D. C., at the hearing scheduled for November 19, 1990, and her husband agreed to be deposed. *See* Joint Opposition at n. 1.

[3] In her appeal, Chadwell also complains that her dismissal was triggered by the ALJ's arbitrary refusal to grant her a continuance to secure a new attorney in the Spring of 1989. Because we deny Chadwell's appeal on procedural grounds, we do not address the merits of her substantive grievance or determine whether reinstatement would have been ordered, had Chadwell not slept so soundly on her rights.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-597

In the Matter of

Amendment of Section 73.202(b), RM-7357
Table of Allotments,
FM Broadcast Stations.
(Ingram, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 15, 1990; Released: December 7, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Richman Phipps ("petitioner") proposing the allotment of Channel 296A to Ingram, Texas, as its first local FM service. Petitioner states that he will apply for this channel, if allotted.

2. Channel 296A can be allotted to Ingram in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.5 kilometers (1.6 miles) northwest of the city in order to avoid a short-spacing to a construction for Station KGSR(FM), Channel 296C2, Bastrop, Texas.[1] Since Ingram, Texas, is located within 320 Kilometers (199 miles) of the U.S.- Mexican border, concurrence by the Mexican government has been requested.

3. In view of the fact that Ingram, Texas, could receive its first local FM service, we believe the public interest would be served by proposing the allotment of Channel 296A to that community. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ingram, Texas	--	296A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 28, 1991,** and reply comments on or before **February 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richman Phipps
836G Sidney Baker
Kerrville, Texas 78028
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the

channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 296A at Ingram are North Latitude 30-05-10 and West Longitude 99-15-27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-65

In the Matter of

Amendment of Section 73.202(b),	RM-7086
Table of Allotments,	
FM Broadcast Stations.	
(Emporia, Fort Scott and	
Independence, Kansas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 15, 1990; Released: December 7, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 1116 (1990), issued in response to a petition filed by Communications Group, Inc. ("petitioner"). The *Notice* proposed the substitution of FM Channel 269C2 for Channel 269A at Emporia, Kansas, and modification of the license for Station KEGS(FM) to specify operation on Channel 269C2. In addition, the *Notice* proposed the substitution of Channel 284A for Channel 269A at Fort Scott, Kansas, and the modification of the license of Wisconsin Voice of Christian Youth, Inc. ("Wisconsin Voice"), for Station KVCY, as well as the substitution of Channel 275A for Channel 269A at Independence, Kansas, and the modification of the license of Central Broadcasting Co., Inc. ("Central Broadcasting"), for Station KIND(FM), in order to accommodate the Emporia proposal. An *Order to Show Cause* was issued to Stations KVCY and KIND(FM), directing the licensees to demonstrate why they should not be modified to specify operation on Channel 284A and 275A, respectively.

2. In response to the *Notice*, petitioner filed supporting comments reaffirming its intention to construct the requested modified facilities. Petitioner indicates that operation on Channel 269C2 will permit a significant increase in its service area and will provide Emporia with its first wide coverage FM service. Petitioner has stated its willingness to reimburse the licensees of Stations KVCY and KIND(FM) for the costs involved in changing channels to accommodate the channel substitution at Emporia.

3. After evaluating the proposal, we believe the public interest would be served by substituting Channel 269C2 for Channel 269A at Emporia, Kansas, since it could provide a wide coverage area FM service to the community. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station KEGS(FM) to specify operation on Channel 269C2 in lieu of Channel 269A at Emporia, Kansas. As indicated in the *Notice*, Channel 269C2 can be allotted to Emporia consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules at petitioner's specified site, provided channel substitutions are made at Fort Scott and Independence.[1] However, as stipulated in the *Notice*, Channel 269C2 at Emporia is currently short spaced to Station KMKE, Channel 269A, Manhattan, Kansas. The license for Station KMKE was modified in MM Docket 87-36 to specify Channel 268C2. *See* 5 FCC Rcd 49 (1990). The grant of a license at Emporia, therefore, is contingent on the licensing of Station KMKE on Channel 268C2.

4. Neither Wisconsin Voice nor Central Broadcasting filed a response to the *Order to Show Cause* showing why the license of Station KVCY and Station KIND(FM) should not be modified to specify operation on Channel 284A and Channel 275A respectively. Accordingly, pursuant to Section 1.87(h) of the Commission's Rules, Wisconsin Voice and Central Broadcasting are deemed to have consented to the proposed modification. Channel 284A may be used at the current site of Station KVCY, Fort Scott,[2] and Channel 275A may be used at the current site of Station KIND(FM), Independence. [3]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Emporia, Kansas	258A, 269C2, 285A
Fort Scott, Kansas	280A, 284A
Independence, Kansas	275A

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Communications Group, Inc. for Station KEGS(FM), Emporia, Kansas, IS MODIFIED, effective **January 22, 1991** to specify operation on Channel 269C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Wisconsin Voice of Christian Youth, Inc., for Station KVCY, Fort Scott, Kansas, IS MODIFIED to specify operation on Channel 284A in lieu of Channel 269A, and the license of Central Broadcasting, Inc., for Station KIND(FM), Independence, Kansas, IS

MODIFIED to specify operation on Channel 275A in lieu of Channel 269A, effective **January 22, 1991,** subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any changes in license BLH-860402KD (Fort Scott) or BLH-4411 (Independence) except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an applicant for construction permit (FCC Form 301); and

(b) Program tests may be conducted in accordance with provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with licenses BLH-860402KD and BLH-4411, respectively, except for the channel as specified above and license applications (FCC Form 302) are filed within ten (10 days) of commencement of program tests.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by Certified Mail, Return Receipt Requested to the following:

Wisconsin Voice of Christian Youth, Inc.
2712 West Vliet Street
Milwaukee, Wisconsin 53208
(licensee of Station KVCY)

Central Broadcasting, Inc.
113 South 8th Street
Independence, Kansas 67301
(licensee of Station KIND(FM))

Manhattan Broadcasting Co., Inc.
P.O. Box 1350
Manhattan, Kansas 66502
(licensee of Station KMKE)

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 269C2 are 38-07-04 and 96-11-41. Since this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provision of Section 73.213(c) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

[2] The coordinates for Channel 284A at Fort Scott are 37-47-47 and 94-42-20.

[3] The coordinates for Channel 275A at Independence are 37-15-42 and 5-45-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-393

In the Matter of

Amendment of Section 73.202(b), RM-7213
Table of Allotments,
FM Broadcast Stations.
(Tomahawk, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 15, 1990; Released: December 7, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5363 (1990), proposing the substitution of FM Channel 223C3 for Channel 224A at Tomahawk, Wisconsin, and modification of the license for Station WJJQ-FM to specify the new channel. The *Notice* was issued in response to a petition filed by Gregory A. Albert and Margaruite S. Albert, d/b/a Albert Broadcasting ("petitioner"). Petitioner filed comments reaffirming its interest in the channel. No other comments were received.

2. We believe the public interest would be served by substituting Channel 223C3 for Channel 224A at Tomahawk, Wisconsin, in order to provide the community with a wide area FM broadcast service. As indicated in the *Notice*, Channel 223C3 can be allotted to Tomahawk consistent with the Commission's spacing requirements at petitioner's specified site.[1] Since Tomahawk is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government has been obtained for this allotment. We will authorize a modification of petitioner's license for Station WJJQ-FM, Tomahawk, to specify operation on Channel 223C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Tomahawk, Wisconsin	223C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WJJQ-FM, Tomahawk, Wisconsin, IS MODIFIED TO SPECIFY operation on Channel 223C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 223C3 are 45-29-27 and 89-43-33.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-104

In the Matter of

Amendment of Section 73.202(b), RM-7166
Table of Allotments,
FM Broadcast Stations.
(Berryville, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 15, 1990; Released: December 7, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 1342 (1990), issued in response to a petition filed by KTHS/KSCC, Inc. ("petitioner"), licensee of Station KSCC(FM), Channel 296A, Berryville, Arkansas, proposing the substitution of Channel 296C3 for Channel 296A, and modification of its license to specify operation on the higher-powered channel. Petitioner filed late comments in support of the proposal.[1] No other comments were received.

2. As indicated in the *Notice*, Channel 296C3 can be allotted to Berryville, Arkansas, at the petitioner's suggested site, which is located 21.3 kilometers (13.2 miles) east of the community,[2] consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. [3]

3. In view of the above, we believe the public interest would be served by substituting Channel 296C3 for Channel 296A at Berryville, Arkansas, since it could provide an expanded coverage FM service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Station KSCC(FM) to specify operation on Channel 296C3 in lieu of Channel 296A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Berryville, Arkansas	296C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to KTHS/KSCC, Inc. for Station KSCC(FM), Berryville, Arkansas, IS MODIFIED effective **January 22, 1991,** to specify operation on Channel 296C3 in lieu of Channel 296A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's late-filed comments were accompanied by a motion for acceptance. Since the petitioner is the only party to this proceeding, we shall consider its late-filed comments in order to permit petitioner to restate its interest in pursuing the proposal.

[2] Coordinates at the petitioner's suggested site for Channel 296C3 at Berryville are 36-20-00 and 93-20-00.

[3] There is a short-spacing of 2 kilometers (1.2 miles) between the petitioner's proposed Class C3 allotment and the transmitter site specified in the construction permit (File No. BPH-881017MI) issued to J. L. Richardson ("Richardson") on Channel 295A at Clarksville, Arkansas, at coordinates 35-33-07 and 93-24-33. However, Richardson's permit was granted pursuant to Section 73.215 of the Commission's Rules. As a result, the Clarksville facility will provide interference protection to the Berryville upgrade by using the contour protection method.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-598

In the Matter of

Amendment of Section 73.202(b), RM-7506
Table of Allotments,
FM Broadcast Stations.
(Mountain Home, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 15, 1990; Released: December 7, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Mountain Home Radio Station ("petitioner"), licensee of Station KPFM(FM), Channel 288A, Mountain Home, Arkansas, seeking the substitution of Channel 288C2 for Channel 288A at Mountain Home and modification of its license to specify operation on the higher powered channel.[1] Petitioner stated its intention to apply for Channel 288C2, if allotted.

2. A staff analysis has determined that Channel 288C2 can be allotted to Mountain Home, Arkansas, at petitioner's present site,[2] consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[3]

3. We believe the public interest would be served by this proposal since it could provide Mountain Home, Arkansas, with an additional expanded coverage FM service. Since petitioner's modification request conforms with the provisions of Section 1.420(g) of the Commission's Rules, we shall propose to modify the facilities of Station KPFM(FM) without entertaining other expressions of interest.

4. Accordingly, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Mountain Home, Arkansas	252A, 288A, 298C1	252A, 288C2, 298C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 28, 1991,** and reply comments on or before **February 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Lawrence J. Bernard, Jr., Esq.
Putbrese, Hunsaker, Ruddy
6800 Fleetwood Road
Suite 100
McLean, VA 22101

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner filed this proposal in response to a *Notice of Proposed Rule Making* (MM Docket No. 87-563), 2 FCC Rcd 7466 (1987). The *First Report and Order* in that proceeding, 5 FCC Rcd 2579 (1990), advised petitioner that while its proposal was unacceptable in the context of MM Docket No. 87-563, it could initiate new proceedings to allot Channel 288C2 to Mountain Home.

[2] Coordinates at the licensed site of Station KPFM(FM) are 36-20-55 and 92-24-01.

[3] Although the proposal is short-spaced to the present operation of Station KOKR(FM) on Channel 288A at Newport, Arkansas, Station KOKR(FM) was moved to Channel 264A in MM Docket No. 87-563. *See* 5 FCC Rcd 2579 (1990). Station KOKR(FM) has filed an application for modification of its license (File No. BMLH-901017KA) for Channel 264A at Newport.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-596

In the Matter of

Amendment of Section 73.202(b), RM-7454
Table of Allotments,
FM Broadcast Stations.
(Dayton, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 15, 1990; Released: December 7, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Peanut Whistle Broadcasting ("petitioner"), permittee of Station KZHR, Channel 223A, Dayton, Washington,[1] requesting the substitution of Channel 223C1 for Channel 223A at Dayton and modification of its construction permit to specify operation on the higher powered channel. Petitioner states that it will apply for Channel 223C1, if allotted.

2. Channel 223A can be allotted to Dayton in compliance with the Commission's minimum distance separation requirements at the petitioner's construction permit site.[2] Since Dayton is located within 320 kilometers (200 miles) from the U.S.- Canadian border, we have requested the concurrence of the Canadian government in this allotment.

3. We believe the public interest would be served by proposing the substitution of Channel 223C1 for Channel 223A at Dayton, Washington, because this would allow that community to have its first expanded coverage FM service. We shall also propose to modify the construction permit for Station KZHR to specify operation on Channel 223C1 in lieu of Channel 223A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest or require that the petitioner demonstrate the availability of an additional equivalent channel at Dayton.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Dayton, Washington	223A	223C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 28, 1991,** and reply comments on or before **February 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jeffrey D. Southmayd, Esq.
Southmayd, Simpson & Miller, P.C.
1233 20th Street, N.W.
Washington, D.C. 20036
(Counsel for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] FCC File No. BPH-890126MG.

[2] The coordinates for Channel 223C1 are 46-19-14 and 117-58-46.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
GTE HAWAIIAN TELEPHONE COMPANY, INC.
MCI INTERNATIONAL, INC.
TRT/FTC COMMUNICATIONS CORPORATION
US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP
WORLD COMMUNICATIONS, INC.

File No. SCL-90-004

Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable System Extending Between the United States Mainland and Hawaii

CABLE LANDING LICENSE

Adopted: November 8, 1990; Released: December 10, 1990

By the Commission:

1. On March 30, 1990, six United States International Service Carriers (hereinafter referred to as Joint Applicants)[1] filed the above-captioned joint application requesting authority pursuant to "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, to land and operate a high capacity digital submarine cable system, known as the HAW-5 Cable System (HAW-5), extending from the United States Mainland to the Island of Oahu, Hawaii.

2. The HAW-5 cable system will land at San Luis Obispo, California and extend to Keawaula, Hawaii. The proposed cable system consists of three segments. Segments A and C are, respectively, the cable stations at California and Hawaii. Segment B consists of the whole submarine cable system provided between and including the system interfaces at Segments A and C.[2]

3. The HAW-5 cable system will employ AT&T's 1.55 micron laser technology (SL 560) operating at 565 Mbit/s on each of two working fiber pairs. The capacity on each fiber pair is provided in four 140 Mbit/s stream, with each 140 Mbits/s stream containing 63 Minimum Investment Units (MIUs). Each MIU consists of a 2.048 Mbit/s bit stream containing 30 minimum assignable units of ownership (MAUOs).[3] The transpacific capacity of HAW-5 (Segment B) will be 252 MIUs (7560 MAUOs) per fiber pair, for a total capacity of 504 MIUs (15,120 MAUOs), or twice the capacity of the HAW-4 Cable System. For voice services, digital circuit multiplication equipment can be employed to derive about 150 virtual voice paths from a single MIU.

4. The proposed cable system will be owned by the Joint Applicants and a number of foreign telecommunications entities. Foreign telecommunications entities in the following locations will participate as owners: Australia, Belgium, Canada, the Federal Republic of Germany, France, Hong Kong, Italy, Japan, the Netherlands, New Zealand, the Philippines, Sweden, Taiwan and the United Kingdom.

5. Pursuant to our obligations under 47 U.S.C. Sections 34-39, the Department of State has been notified and has approved the landing of the HAW-5 cable system in the United States.

6. Based on the information provided by the Joint Applicants, we conclude that the grant of the requested authorizations will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4335 (1976).[4] Consequently, no environmental assessment is required to be submitted with this Joint Application by Section 1.1311 of the Commission's Rules.

7. Concurrent with consideration of this application, this Commission has granted the Joint Applicants authority under Section 214 of the Communications Act of 1934, as amended, to construct and operate the HAW-5 cable system. For the reasons set forth in that order, we find that this application requesting a cable landing license should be granted.

8. Accordingly, this Commission HEREBY GRANTS AND ISSUES under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, and pursuant to authority delegated to this Commission under Executive Order No. 10530, dated May 10, 1954, 3 C.F.R. 1954-1958 Comp., p.189 (1961), *reprinted in* 3 U.S.C.A. §301 at 1052 (1985), to the applicants (AT&T, HTC, MCII, TRT/FTC, US Sprint and Worldcom)[5] a license to land and operate one high capacity digital submarine cable having a nominal capacity of 1,130 Mbit/s (565 Mbit/s per pair SL design) with associated regenerators and supervisory circuits and armoring where necessary extending between the United States Mainland on the east and Oahu, Hawaii on the west. This license is subject to: (1) "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39; (2) the Communications Act of 1934, as amended, 47 U.S.C. §§151-609; (3) subsequent applicable acts; (4) all rules and regulations of the Federal Communications Commission; (5) any treaties or conventions relating to communications to which the United States of America is now or may hereafter become a party; (6) any actions by the Commission or the Congress of the United States of America rescinding, changing, modifying, or amending any rights accruing to any person; and (7) the following conditions:

> (1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved

or shifted by the Licensees at their expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensees shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) The Licensees or any persons or companies controlling them or controlled by them do not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensees or any persons or companies controlling them or controlled by them are parties;

(4) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensees to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, or for failure to comply with the terms of the authorization;

(6) The Licensees shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

(7) The terms and conditions upon which this license is given shall be accepted by the Licensees by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Joint Applicants include American Telephone and Telegraph Company (AT&T), GTE Hawaiian Telephone Company Incorporate (HTC), MCI International, Inc. (MCII), TRT/FTC Communications, Inc. (TRT/FTC), US Sprint Communications Company Limited Partnership (US Sprint) and World Communications, Inc. (Worldcom). Three carriers originally listed as Joint Applicants are no longer involved in the acquisition of HAW-5 capacity. By letter dated June 20, 1990 the Commission approved the *pro forma* transfer of control and assignment of licenses from FTCC to TRT/FTC. The transaction was consummated on June 29, 1990, which resulted in TRT/FTC as the sole surviving carrier. *See* File Nos. CSG-90-027-(5)AL and I-T-C-90-067-TC. Long Distance/USA (LD/USA) has been acquired by US Sprint and the capacity LD-USA originally proposed to acquire in HAW-5 has been assigned to US Sprint. Also, Fedex International Transmission Corporation has withdrawn from HAW-5.

[2] The System Interface is defined as the nominal 140 Mbit/s digital input/output ports on the digital distribution frame (excluding the digital distribution frame itself) where the 139,264,000 bits per second digital line section connects with other transmission facilities or equipment.

[3] A MIU is the minumum unit of ownership investment in HAW-5 and is the equivalent of 30 MAUOS. Interests in fewer than 30 MAUOs may be purchased on an indefeasible right of user (IRU) basis. A MAUO is an equivalent digital channel operating at 64,000 bits per second and an additional 9,684,656 bits per second required for multiplexing.

[4] *See* Section 214 Application, File No. I-T-C-90-081, at p. 21.

[5] *See supra* n. 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-505

In re Applications of

GERALD PENOVICH (herafter "Penovich")	File No. BPH-880518MA
ANDERSON BROADCASTING CO., LTD. (hereafter "Anderson")	File No. BPH-880518MK
PARADISE COMMUNICATIONS LIMITED PARTNERSHIP (hereafter "Paradise")	File No. BPH-880519MC
PRIZE BROADCASTING, INC. (hereafter "Prize")	File No. BPH-880519MM
CHARISMA RADIO PARTNERS (hereafter "Charisma")	File No. BPH-880519MN
MINORITY BROADCAST DEVELOPMENT, INC. (hereafter "Minority")	File No. BPH-880519MO
BIRDSONG BROADCASTING (hereafter "Birdsong")	File No. BPH-880519MP
PALM BROADCASTING LIMITED PARTNERSHIP (hereafter "Palm")	File No. BPH-880519MW
BELKIS J. LEZCANO (hereafter "Lezcano")	File No. BPH-880519NB
LINDA GILES (hereafter "Giles")	File No. BPH-880519NC
PRESS BROADCASTING COMPANY (hereafter "Press")	File No. BPH-880519NK
FEMALE FREQUENCY (hereafter "Female")	File No. BPH-880519NM
Pam Gooderham and Charlene Swartley, General Partners, d/b/a GOODERHAM/ SWARTLEY TICE LIMITED (hereafter "Tice Limited")	File No. BPH-880519NP
TICECOMM, INC. (hereafter "TiceComm")	File No. BPH-880519NY

For Construction Permit
for a New FM Station on Channel 229A
(93.7MHz) in Tice, Florida

HEARING DESIGNATION ORDER

Adopted: October 17, 1990; Released: December 10. 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters*. On September 8, 1988 Birdsong filed an amendment to its application. The subject matter of the amendment was threefold: the amendment contained a certification that Birdsong was now financially qualified; it specified a new transmitter site, and it changed the applicant from a corporation to a general partnership. As noted in Birdsong's cover letter, it was submitting the "facsimile signature of its general partner but will immediately supplement the amendment with the original signature on receipt." The supplemental amendment containing the original signature of the general partner was not received until September 20, 1988. Birdsong's 30-day period for filing amendments as a matter of right, began August 8, 1988 and ended September 8, 1988. Birdsong's September 8, 1988 amendment is procedurally defective since it was not signed by one of the partners pursuant to 47 C.F.R. § 73.3513(a)(2) and will be returned.

3. After the close of the amendment as of right period, an applicant cannot file a curative amendment to correct a grantability defect. *See Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985). To accept amendments after the close of the amendment as of right period would be unfair to the other applicants in this proceeding, who fully complied with our acceptability requirements as of the amendment as of right date. *See PrimeMedia Broadcasting*, Inc., 3 FCC Rcd 4293 (1988); *See also, Emmy Hahn Limited Partnership*, 4 FCC Rcd 8336 (1989); *Domega Broadcasting Corporation*, 4 FCC Rcd 1450 (1989). Accordingly, Birdsong's financial certification is untimely and an appropriate issue will be specified as to Birdsong's financial qualifications.

4. On April 21, 1986 WEZY-FM, Lakeland, Florida filed an application for modification of facilities within the 30-day filing window for the Tice allotment. An engineering review of Birdsong's application, as originally filed, reveals that it is mutually exclusive with the pro-

posal filed by WEZY. In the *Report and Order* in MM Docket 84-750, *supra*, the Commission stated that an amendment which extricates an application from conflict with another timely filed application is acceptable at any time. 50 Fed. Reg. at 19941, n. 32. Accordingly, that portion of Birdsong's September 20, 1988 amendment that removes the conflict with the proposal of WEZY will be accepted for good cause.

5. The September 20, 1988 amendment will also be accepted pursuant to 47 C.F.R. § 1.65 as to that portion which informs the Commission of a change in the structure of the applicant from a corporation to a general partnership with the percentages of ownership remaining the same.

6. *Paradise*. Information before the Commission indicates that Paradise was organized and is affiiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judgse in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: Whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Paradise's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Paradise in this proceeding.

7. *Anderson*. Applicants for new broadcast stations are required by 47 C.F.R. § 73.3580 to give local notice of the filing of their applications. Anderson has published the required notice, but the notice is deficient. Anderson did not publish the notice twice a week for two weeks as required if there is a daily newspaper published in the community. Additionally, Anderson did not place its public file in the proposed community of license. To remedy these deficiencies, Anderson must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

8. *Minority*. Minority's application as originally filed reported that Darie Hamilton, at that time a non-voting stockholder in Minority,[2] was general partner and 25% equity holder in an application filed by 105.3 Ltd. for a new FM at Solana, Florida. On September 6, 1988, Minority amended its application to report that the Solana, Florida application was designated for hearing on October 9, 1987. *Hearing Designation Order* in MM Docket 87-464, 2 FCC Rcd 6742 (1987). During the course of the comparative hearing an issue was designated against Darie Hamilton to determine whether she withheld information or answered questions untruthfully during the discovery phrase of the proceeding. *Memorandum Opinion and Order* in MM Docket No. 87-464 (FCC 88M-1625), released May 26, 1988. The issue was never resolved because on April 13, 1989, 105.3's application was dismissed with prejudice as a result of a settlement agreement. Accordingly, the unresolved issue will be specified as to Minority below.

9. *Prize and Press*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Prize and Press have filed such statements, they are deficient. Prize has failed to identify specific sources of recuitment specializing in minority candidates. Press has failed to identify specific sources of recruitment specializing in women candidates. Accordingly, Prize and Press will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

10. *Press and Female*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Press and Female have not completed Item 4 correctly. Press's application, as amended, gives a post office box number as the residence address for the applicant and for one of its principals, Robert E. McAllan. Additionally, Press does not give residence addresses for the other principals of the applicant. Female's application gives a post office box number as the residence address for the applicant. Accordingly, Press and Female must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of the Order.

11. *Female*. Geraldine Parrot, a 33-1/3 partner in Female, is the wife of Billy J. Parrott. [3] Mr. Parrott, president and sole shareholder in Roanoke Cellular, is also president, director and 47.3% voting shareholder in Private Networks, Inc. ("PNI"). PNI is in turn 51% partner in PN Radio Company; 49% of PN Radio is held by Broadcast Data Corp., a wholly-owned subsidiary of Graphic Scanning Corp.

12. In an action relative to the parent of PNI's partner in PN Radio Company, Graphic Scanning Corp., by Order released August 24, 1982, the Commission designated for hearing applications filed by A.S.D. Answer and P.A.L. Communications System, Inc. The stated purpose of the proceeding was to determine the relationship between Graphic and the applicants and, in particular, whether Graphic is a real party in interest in the ap-

plicants. In an Initial Decision released January 5, 1985, the presiding Administrative Law Judge concluded (a) that, because of the non-traditional nature of the transactions involved, Graphic shall be deemed the real party in interest in the A.S.D., Vineyard, P.A.L. and B.W. applications; and (b) that all parties had exhibited a lack of candor and on occasion, intentionally misrepresented material facts to the Commission.

13. Claiming the above conclusions were without merit, Graphic filed exceptions with the Commission on March 15, 1985. After a proxy fight resulted in new management, Graphic asked the Commission to approve a settlement between the concerned parties. By its *Memorandum Opinion & Order*, released November 21, 1986, the Commission approved such an agreement vacating the conclusions reached in the *Initial Decision*. This action absolved the revised Graphic corporate entity from the Administrative Law Judge's adverse conclusions, but held that the findings would apply if former Graphic principals Yampol, Slodowitz and Finfer, who were active in management at the time of the alleged misconduct were to regain control of Graphic. *A. S. D. Answer Service, Inc. et al.*, 1 FCC Rcd 753 (1986), at paragraph 6. A petition for reconsideration of this action has been filed.

14. We also note that an affiliate of Broadcast Data Corp.'s parent company, Graphic Scanning Corp., has been named as a defendant in a lawsuit captioned *Utah Telecourier v. MCI Telecommunications Corporation, et al.* (W.D. Utah, 1984) in which the trading of interests in cellular radio telephone partnerships in connection with the Salt Lake City, Utah market has been challenged under state and federal anti-trust laws. *See e.g., Meridian Communication*, MM Docket No. 87-177, 2 FCC Rcd 3630 (1987). An appropriate condition will therefore be specified below. Finally, a complaint has been filed by the Securities and Exchange Commission in the United States District Court for the Southern District of New York alleging the filing with the SEC of certain false, misleading and untimely statements concerning investment made in Graphic Scanning Corp. by Amster & Co., Arnold Marvin Amster, Barry Stuart Lafer, and Joel R. Packer in 1987. An appropriate condition will also be specified below concerning this matter.

15. On September 20, 1988, Birdsong petitioned for leave to amend its application after the last day for filing amendments as of right. The engineering portion of the subject amendment was accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2)(*See* para. 4, *supra)*; consequently, the amendment, in part, is accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

16. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE(S) FILED
Paradise	September 27, 1988, June 9, 1989
Charisma	January 30, 1990
Minority	August 21, 1989, January 11, 1990
Birdsong	September 20, 1988 (*See* para. 5, *supra)*
Lezcano	October 3, 1989, July 17, 1990
Press	July 26, 1989
Tice Limited	May 15, 1989, October 13, 1988
TiceComm	October 4, 1988, June 20, 1989

17. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Prize would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

18. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

19. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

20. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Birdsong, whether the applicant is financially qualified.

2. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Paradise.

3. To determine whether Paradise's organizational structure is a sham.

4. To determine, from the evidence adduced pursuant to Issues 2 through 3 above, whether Paradise possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine (a) whether 105.3 Ltd.'s principal, Darie D. Hamilton, withheld information and answered questions untruthfully during discovery in the Solana, Florida proceeding (MM Docket No. 464, (b), whether 105.3 Ltd avoided compliance with the reporting requirements, and (c) from the evidenced adduced pursuant to Issues 5(a) and 5(b) above, whether Minority possesses the basic qualifications to be a licensee of the facilities sought herein.

6. To determine whether there is a reasonable possibility that the tower height and location proposed by Prize would constitute a hazard to air navigation.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

21. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraph 2 hereinabove, the amendment of September 8, 1988 filed by Birdsong IS HEREBY RETURNED.

22. IT IS FURTHER ORDERED, that within 30 days of the release of this Order, Anderson shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of application has been republished.

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Prize and Press shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

24. IT IS FURTHER ORDERED, That Press and Female shall submit an amendment which contains the information required by Section II, 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to Female as a result of this proceeding, its grant will be without prejudice to: (i) whatever action, if any, the Commission may deem appropriate should former Graphic principals Yampol, Slodowitz and Finfer regain control of Graphic; the outcome of (ii) the appeal in *A. S. D. Answer Service, Inc., et al.*, CC Docket No. 82-587 et seq.; (iii) *Utah Telecourier* v. *MCI Telecommunications Corporation et al.*, and (iv) the untitled complaint brought by the U.S. Securities and Exchange Commission in the District Court for the Southern District of New York alleging filing with the SEC of false, misleading and untimely statements.

26. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Paradise, Charisma, Minority, Birdsong, Lezcano, Press, Tice Limited and TiceComm ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED,That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] On March 20, 1990, Orange River Broadcasting, Ltd. (BPH-880519NJ) requested dismissal of its application. The request was voluntary and in accordance with our requirements governing such matters. Accordingly, the application was dismissed by Commission letter dated June 13, 1990.

[2] Minority amended its application August 23, 1989 to report that as of July 24, 1989 Ms. Hamilton was the sole non-voting stockholder and possessor of 75% equity interest in Minority. On January 11, 1990, Minority amended its application to report that Ms. Hamilton has transferred her entire interest in Minority to her husband, Mark J. Kline, in the "Mark J. Kline Revocable Trust UTD 10788," in which she is the sole beneficiary.

[3] Commission policy states that a common interest can reasonably be presumed to exist between husband and wife and that the broadcast interests of one must be attributed to the other. *See Alexander S. Klein*, 86 FCC 2d 423, 425-27 (1981).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-515

In re Applications of

Radio Associates, Inc. (hereafter "Associates")	File No. BPH-880720MQ
DOXA, Inc. (hereafter "DOXA")	File No. BPED-880722MB
Anthony J. Bove, Jr. (hereafter "Bove")	File No. BPH-880722MJ
Hoosier Aurora Broadcasting Co. (hereafter "Hoosier")	File No. BPH-880722ML
Helen Sparks Quinn (hereafter "Quinn")	File No. BPH-880722MP
Brownsburg Broadcasting Co. (hereafter "BBC")	File No. BPH-880722MQ
The Moody Bible Institute of Chicago (hereafter "Moody")	File No. BPED-880725MB
Bulldog Broadcasting, Inc. (hereafter "Bulldog")	File No. BPH-880725MD
Sharpe Communications Limited Partnership (hereafter "Sharpe")	File No. BPH-880725ME
Pamela R. Jones (hereafter "Jones")	File No. BPH-880725MF

For Construction Permit
for a New FM Station on
Channel 270A (101.9 MHz)
in Brownsburg, Indiana

HEARING DESIGNATION ORDER

Adopted: October 17, 1990; Released: December 10, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. It should be noted that due to the late 30-day notice of amendment tenderability period opened on April 9, 1990 by the reinstatement of applicant Associates, various amendments filed by the competing applicants, which otherwise would have been late-filed, will be considered filed as of right and, therefore, will be afforded full comparative advantage. *See Memorandum Opinion and Order*, reconsideration in MM Docket 84-750, 50 Fed. Reg. 43,157 (1985).

3. *Associates*. In response to Section III, FCC Form 301 (October 1986), Associates certified that it did not have sufficient net liquid assets on hand nor did it have sufficient funds available from committed sources to construct and operate the requested facilities for three months without revenue. Although Associates indicated that it would file a financial amendment, no such amendment certifying that the assets or funds are on hand or available has been submitted. Accordingly, Associates will be required to demonstrate its financial qualifications at hearing pursuant to the appropriate financial issue specified below.

4. *Jones*. Jones is also an applicant (File No. BPH-880301OY) for a construction permit for a new FM station on Channel 230A in Modesto, California, MM Docket No. 90-68. As set forth by the Review Board in a *Memorandum Opinion and Order* in that proceeding, FCC 90R-65 (released July 26, 1990),[1] Jones filed numerous applications and has not shown that she is financially qualified to build and operate any of them. Where an applicant files multiple applications, it must be able to demonstrate its financial qualifications as to all pending applications. *George Edward Gunter*, 60 RR 2d 1662, 1664 (1986). In this regard, the Commission has expressed its concern with the financial qualifications of applicants filing "a large number of pending broadcast applications. *See, In the Matter of Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, 2 FCC Rcd 2122 (1987). As noted by the Presiding Judge, Jones fell squarely into this category, and a financial issue was specified against her. Further, the Judge in the Modesto proceeding added an issue to determine whether Jones violated Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65, in connection with her failure to timely amend her application to update the status of her media interests. Again, as noted by the Review Board, a reporting issue was previously designated against an applicant with which Jones was associated, and Jones apparently failed to respond to a directive in a subsequent *Hearing Designation Order* [2] requiring her to amend her application. Since, in light of this, the Judge in the Modesto proceeding was unable to determine whether Jones' reporting deficiencies were disqualifying, an appropriate issue was specified. Finally, the Judge added a third issue against Jones, *i.e.*, to determine, in connection with her filing of numerous applications, whether she violated the provisions of Sections 73.3555 and 73.3518 of the Rules, 47 C.F.R. §§ 73.3555 and 73.3518, and/or abused Commission processes. In light of the specification of

these issues in the Modesto proceeding against Jones, a grant of her application in the instant proceeding will be subject to the resolution of those issues.

5. The applicants below have petitioned for leave to amend their application on the dates show. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Associates	August 2, 1990
DOXA	July 15, 1990
Jones	May 9, 1990; June 4, 1990; June 25, 1990; July 30, 1990

6. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. DOXA and BBC have not completed Item 4 correctly. DOXA's application does not specify the street addresses for Lloyd Chambers, Jim Whitaker, and Edward Chaney, all of whom are listed as principals. BBC's application does not specify a street address for principals Kenneth W. McClara and Carolyn S. McClara. Accordingly, DOXA and BBC must submit amendments which give all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

7. Since no determination has been received from the Federal Aviation Administration as to whether the antennae proposed by Associates, by Quinn, and by Jones would constitute hazards to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Associates, whether the applicant is financially qualified.

2. To determine whether there is a reasonable possibility that the towers heights and locations proposed by Associates, by Quinn, and by Jones would constitute hazards to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Associates, DOXA, and Jones ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That a grant of Jones' application shall be without prejudice to whatever action, if any, the Commission may deem appropriate in light of the ultimate resolution of the issues specified against Pamela Jones in MM Docket 90-68.

14. IT IS FURTHER ORDERED, That DOXA and BBC shall submit amendments which contain the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The Review Board's *Memorandum Opinion and Order* denied as interlocutory an appeal from several *Orders* by Chief Administrative Law Judge Joseph Stirmer adding issues against Jones in the Modesto proceeding. *See, Memorandum Opinion and Order*, FCC 90M-1347, released May 25, 1990, and *Memorandum Opinion and Order*, FCC 90M-1627, released June 12, 1990.

[2] DA 90-196, at paragraph 15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-514

In re Applications of

JEWELL SCHAEFFER BROADCASTING CO. (hereafter "Jewell") File No. BPH-890223ME

GEORGE C. HELTON AND GERALD E. DAVIS d/b/a MANCHESTER BROADCASTING COMPANY (hereafter "MBC") File No. BPH-890223MG

For Construction Permit
for a New FM Station on Channel 267A
in Manchester, Ohio

HEARING DESIGNATION ORDER

Adopted: October 17, 1990; Released: December 10, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Jewell petitioned for leave to amend its application on February 2, 1990 and July 6, 1990. The accompanying amendments were filed after July 3, 1989, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

3. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. MBC has not completed Item 4 correctly. MBC's application gives a post office box number as the residence address for Gerald E. Davis. Accordingly, MBC must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Jewell ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

7. IT IS FURTHER ORDERED, That MBC shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

8. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-304

In the Matter of

Amendment of Section 73.202(b), RM-7295
Table of Allotments,
FM Broadcast Stations.
(Nyssa, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 14, 1990; Released: December 10, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Robert M. Mason ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 3531 (1990), proposing the substitution of Channel 254C1 for Channel 254A at Nyssa, Oregon, and the modification of Station KGZH's construction permit to specify operation on the higher powered channel. Petitioner filed comments supporting the proposed substitution of channels and reiterating his intention to apply for Channel 254C1, if allotted. No other comments were received.

2. As stated in the *Notice*, petitioner requested the allotment of Channel 254C1 to Nyssa with a site restriction of 51.6 kilometers (32.1 miles), while the Commission, at the rule making stage, assumes compliance with the city-grade coverage requirements only if the site restriction is no greater than 50 kilometers (31.1 miles). Therefore, we requested that petitioner provide additional information demonstrating that affirmative steps had been taken to secure assurances from the owner of the proposed site that he will be able to purchase or lease the specific location specified in his petition and obtain FAA approval for a tower at the proposed site. *See Woodstock and Broadway, Virginia*, 3 FCC Rcd 6398 (1988). In response, petitioner states he specified an existing tower site owned by Gem Communications, Inc., but that he has since been informed that the tower is not available. However, he states that Gem Communications, at his request, has obtained assurance of a new transmitter site less than 1.4 kilometers (.9 miles) from the site specified in the petition for rule making. Petitioner states that the proposed site is owned by the Bureau of Land Management and that discussions between Gem Communications and the local Bureau of Land Management Supervisor indicate that there should be no problem in acquiring a land use permit. Petitioner further states that an actual terrain study shows that an overall tower height of not more than 199 feet above ground level would be required to provide the required signal level to Nyssa. He states that a proposed tower of this height does not require notification to the FAA because the closest landing area is a private landing strip located 18.5 kilometers (11.5 miles) from the proposed transmitter site.

3. We believe the public interest would be served by substituting Channel 254C1 for Channel 254A at Nyssa, Oregon, since it could provide the community with a wide coverage area FM service. We find that petitioner has presented sufficient information to conclude that reasonable assurances exist that the proposed transmitter site is available and that use of the site will comply with FAA requirements. Channel 254C1 can be allotted to Nyssa in compliance with the Commission's minimum distance separation requirements with a site restriction of 52.8 kilometers (32.8 miles) south to avoid short-spacings to Stations KUBQ(FM) (formerly KKUC(FM)), Channel 254C2, La Grande, Oregon, and KWEI-FM, Channel 257A, Weiser, Idaho, and also to accommodate petitioner's desired transmitter site.[1] As proposed, we will modify petitioner's construction permit for Station KGZH to specify operation on Channel 254C1 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 24, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Nyssa, Oregon	254C1

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Robert M. Mason for Station KGZH, Nyssa, Oregon, IS MODIFIED to specify operation on Channel 254C1, in lieu of Channel 254A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 254C1 at Nyssa are North Latitude 43-25-01 and West Longitude 116-50-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-371

In the Matter of

Amendment of Section 73.202(b), RM-7215
Table of Allotments,
FM Broadcast Stations.
(Exmore, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 15, 1990; Released: December 10, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Seashore Broadcasting Company ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 5179 (1990), proposing the substitution of Channel 291B1 for Channel 291A at Exmore, Virginia, and the modification of its construction permit for Station WPHG(FM) o specify operation on the higher class channel. Petitioner filed supporting comments reaffirming its intention to apply for Channel 291B1, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 291B1 for Channel 291A at Exmore, Virginia, since it would provide the community with an expanded coverage area FM service. Channel 291B1 can be allotted to Exmore, Virginia, in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.5 kilometers (1.6 miles) north of Exmore to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify petitioner's construction permit for Station WPHG(FM) to specify operation on Channel 291B1 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 24, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Exmore, Virginia	291B1, 298B

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit (BPH-880324MP) for Station WPHG(FM), Exmore, Virginia, IS MODIFIED to specify operation on Channel 291B1, in lieu of Channel 291A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 291B1 at Exmore are North Latitude 37-33-15 and West Longitude 75-49-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-171

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Alamogordo, New Mexico)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 15, 1990; Released: December 10, 1990

By the Assistant Chief, Policy and Rules Division:

1. By *Notice of Proposed Rule Making*, 4 FCC Rcd 4904 (1989), the Commission, on its own motion, proposed the substitution of Channel 232C3 for Channel 232A at Alamogordo, New Mexico, and the modification of the license of New West Broadcasting Co. ("New West"), for Station KYEE to specify operation on the higher powered channel. Petitioner filed comments expressing its intention to apply for Channel 232C3, if allotted.[1] The Federal Aviation Administration ("FAA") also filed comments.[2]

2. We believe the public interest would be served by substituting Channel 232C3 for Channel 232A at Alamogordo, New Mexico, since it could provide the community with expanded radio service. Channel 232C3 can be allotted to Alamogordo in compliance with the Commission's minimum distance separation requirements and can be used at Station KYEE's licensed transmitter site. [3] Mexican concurrence has been received since Alamogordo is located within 320 kilometers (199 miles) of the U.S. - Mexican border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 24, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Alamogordo, New Mexico	232C3, 279C1, 287C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of New West Broadcasting Co. for Station KYEE, Alamogordo, New Mexico, IS MODIFIED to specify operation on Channel 232C3, in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] New West's comments were untimely filed but were accompanied by a request for their acceptance. Since this is an uncontested proceeding, we will accept New West's comments for the purpose of expressing continuing interest.

[2] The FAA filed comments concerning this docket and other dockets initiated simultaneously. *See* 5 FCC Rcd 2152 (1990). The FAA's concerns will be treated consistent with the treatment afforded in other proceedings. 5 FCC Rcd 2152, n.4.

[3] The coordinates for Channel 232C3 at Alamogordo are North Latitude 32-56-42 and West Longitude 105-56-47. Because the rule making which resulted in this allotment was initiated prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-344

In the Matter of

Amendment of Section 73.202(b),	RM-6674
Table of Allotments,	RM-7157
FM Broadcast Stations.	
(Rosamond and California City, California)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 15, 1990; Released: December 10, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 6188 (1989), issued in response to a request filed on behalf of P. Dale Ware (petitioner), proposing the allotment of Channel 228A to Rosamond, California, as that community's second local FM broadcast service.[2] Petitioner filed comments in support of the proposal. California City Radio ("CCR") filed comments and a counterproposal [3] seeking to allot Channel 228A to California City as that community's first local broadcast service. Petitioner filed reply comments. No other comments were received.

2. CCR, in its counterproposal, states an intention to apply for Channel 228A, if allotted to California City. In reply comments, petitioner states that while Channel 228A is the only frequency available for allotment to Rosamond, Channel 295A could be allotted to California City consistent with the Commission's minimum distance separation requirements. Thus, petitioner argues there is no need to undertake a comparative analysis of the two proposals since each may be accommodated.

3. The requests to use Channel 228A at Rosamond and California City are mutually exclusive since the communities are separated by less than the required minimum distance of 115 kilometers (71.5 miles) between co-channel Class A allotments. However, we have confirmed petitioner's assertion that Channel 295A can be allotted to California City to satisfy CCR's desire to provide a first local service to that community.

4. We believe the public interest would be served by each proposal since Rosamond could receive an additional local FM service, and California City could receive a first local broadcast service. A staff engineering analysis has determined that Channel 228A can be allotted to Rosamond in conformity with the minimum distance separation requirements of the Commission's Rules, provided the transmitter is sited at least 11.8 kilometers (7.3 miles) northwest[4] of the community to avoid a short-spacing to Station KNTF(FM), Channel 228A, Ontario, California.[5] Channel 295A can be allotted to California City consistent with Section 73.207(b) of the Commission's Rules with a site restriction 6.9 kilometers (4.3 miles) north of the community[6] to avoid a short-spacing to Station KROQ-FM, Channel 294B, Pasadena, California.[7] Additionally, since Rosamond and California City are each located within 320 kilometers (199 miles) of the Mexican border, the Commission obtained Mexico's concurrence in the proposals.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 24, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
California City, California	295A
Rosamond, California	228A, 288A

6. The window period for filing applications for Channel 295A at California City, California, and Channel 228A at Rosamond, California, will open on **January 24, 1991,** and close on **February 25, 1991.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of California City, California, has been added to the caption.

[2] The *Notice* mistakenly identified petitioner's proposal as proposing a first local broadcast service at Rosamond. However, Station KAVC(FM), Channel 288A, is licensed to that community.

[3] Public Notice of the counterproposal was given November 3, 1989, Report No. 1800.

[4] Coordinates used for Channel 228A at Rosamond are 34-56-56 and 118-14-07. Since this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

[5] The *Notice* mistakenly indicated that the site restriction was required to avoid a short-spacing to Station KFOX(FM), Channel 228A, Redondo Beach, California, rather than Station KNTF(FM), Channel 228A, Ontario, California. Coordinates at the licensed site of Station KNTF(FM) are 34-10-35 and 117-34-27.

[6] Coordinates used for Channel 295A at California City are 35-11-13 and 117-58-14. The spacing requirements for the California City proposal are based on those adopted in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989), which *inter alia*, increased the maximum power for Class A facilities to 6 kW and adjusted the minimum distance separations accordingly. *See* 47 CFR § 73.207(b)(1).

[7] Coordinates at the licensed site of Station KROQ-FM at Pasadena are 34-11-47 and 118-15-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-599

In the Matter of

Amendment of Section 73.202(b), RM-7523
Table of Allotments,
FM Broadcast Stations.
(Fort Bragg, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 15, 1990; Released: December 10, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is the petition for rule making, as amended,[1] filed on behalf of Susan I. Waters ("Waters"), permittee of Station KZPB(FM), Channel 244A, Fort Bragg, California, and The Henry Radio Company ("HRC"), the proposed assignee of Station KZPB(FM), seeking the substitution of Channel 244B for Channel 244A and modification of the construction permit accordingly. HRC incorporates by reference the petition for rule making submitted by Waters and states its intention to apply for Channel 244B, if allotted to Fort Bragg.

2. A staff analysis has determined that Channel 244B can be allotted to Fort Bragg, California, at the petitioners' present site, located 4.5 kilometers (2.8 miles) northeast of the community,[2] consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. We believe the public interest would be served by the proposal since it could provide Fort Bragg with an expanded coverage FM service. Since petitioners' modification request conforms with the provisions of Section 1.420(g) of the Commission's Rules, we shall propose to modify the construction permit issued to Susan I. Waters for Station KZPB(FM), Channel 244A, without entertaining other expressions of interest.

4. Accordingly, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Fort Bragg, California	237A, 244A, 249A	237A, 244B, 249A[3]

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 31, 1991,** and reply comments on or before **February 15, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners' counsel, as follows:

Richard J. Hayes, Jr., Esq.
1359 Black Meadow Road
Spotsylvania, VA 22553

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The amended proposal reflects Waters's agreement with Brian J. Henry of The Henry Radio Company for an assignment of the construction permit (File No. BPH-880527MQ) for Station KZPB(FM). The assignment application (File No. BAPH-900824HZ) was granted October 16, 1990, but it has not been consummated. The parties will be jointly identified herein as "petitioners."

[2] Coordinates at the site specified in the construction permit issued to Waters are 39-27-53 and 123-45-27.

[3] Channel 253A has been proposed as a substitute for Channel 249A in MM Docket No. 88-192. *See* 3 FCC Rcd 2690 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-499

In the Matter of

Amendment of Section 73.202(b), RM-6928
Table of Allotments,
FM Broadcast Stations.
(Sparta and Saint Robert,
Missouri) .

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 15, 1990; Released: December 10, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8123 (1989), issued in response to a petition filed by James L. Gardner ("petitioner"). The *Notice* proposed the substitution of FM Channel 243C2 for Channel 243A at Sparta, Missouri, and modification of the license for Station KLTQ to specify operation on Channel 243C2 in lieu of Channel 243A. Petitioner filed comments in support of the proposal. Neil A. Rones and Luann C. Dahl ("Rones and Dahl") filed comments. Petitioner filed reply comments.

2. The proposed upgrade at Sparta requires the substitution of Channel 255A for vacant Channel 243A at Saint Robert, Missouri. One application is on file for Channel 243A at Saint Robert. Rones and Dahl, applicant for Channel 243A at Saint Robert (BPH-890206MD), object to the proposed substitution at Saint Robert unless they are appropriately reimbursed for their expenses for specifying the new Saint Robert channel. In reply comments, petitioner states that he will follow the Commission's policies regarding reimbursements for applicants.

3. We have reviewed the pleadings before us and find that the public interest would be served by the substitution of Channel 243C2 for Channel 243A at Sparta, Missouri, and substitution of Channel 255A for Channel 243A at Saint Robert, Missouri, since the substitution would provide Sparta with a wide area FM service. As requested, we will also modify petitioner's license for Station KLTQ to specify operation on Channel 243C2 in accordance with Section 1.420(g) of the Commission's Rules. Rones and Dahl will be permitted to amend their application for Channel 243A at Saint Robert to specify operation on Channel 255A. They will retain cut-off protection since the channels are of equivalent class. *See Phillipsburg, Kansas*, 48 FR 10844 (1983). Finally, in response to the reimbursement issue raised by Rones and Dahl, there is no Commission policy of reimbursement with respect to applicants for a channel allotment. Only licensees and permittees are entitled to reimbursement. *See, e.g., Glenenden Beach, Sweet Home and Toledo, Oregon*, 4 FCC Rcd 7796 (1989). Therefore, petitioner is not responsible for reimbursing Rones and Dahl.

4. Channel 243C2 can be allotted to Sparta in compliance with the Commission's minimum distance separation requirements at petitioner's proposed site.[1] Although not indicated in the *Notice*, Channel 243C2 conflicts with the licensed site for Channel 244A, Harrison, Arkansas. However, the license for Station KCWD was modified in MM Docket 87-73 to specify operation on Channel 241C2, and a construction permit (BPH-900420ID) has been granted for Channel 241C2 at a site that does not conflict with Channel 243C2 at Sparta. The grant of a license for Channel 243C2, Sparta, may be withheld until a license is issued to cover the construction permit for Channel 241C2 at Harrison. Channel 255A can be allotted to Saint Robert in compliance with the Commission's minimum distance separation requirements at the city reference coordinates.[2]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 24, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Saint Robert, Missouri	255A
Sparta, Missouri	243C2

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KLTQ, Sparta, Missouri, IS MODIFIED to specify operation on Channel 243C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, RETURN RECEIPT REQUESTED, a copy of this *Report and Order* to the applicant for Channel 243A at Saint Robert, Missouri, as follows:

Neil A. Rones
Luann C. Dahl
1268 Mautenne
St. Louis, Missouri 63021

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, RETURN RECEIPT REQUESTED, a copy of this *Report and Order* to Station KCWD, Harrison, Arkansas, as follows:

Harrison Radio Station, Inc.
P.O. Box 850
Harrison, Arkansas 72601

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 243C2 are 36-56-23 and 93-17-15. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the licensee may avail himself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

[2] The coordinates for Channel 255A at Saint Robert are 37-49-41 and 92-10-39.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MOBILFONE OF NORTHEASTERN PENNSYLVANIA, INC. File No. 22505-CD-P/L-1-85

For authority to establish a new one-way signaling facility on frequency 152.84 MHz in the Public Land Mobile Service at Monticello, New York

MEMORANDUM OPINION AND ORDER

Adopted: December 3, 1990; Released: December 11, 1990

By the Chief, Common Carrier Bureau:

1. Mobilfone of Northeastern Pennsylvania, Inc. (Mobilfone) filed a petition for reconsideration of the Mobile Services Division's (MSD) action dismissing its Monticello, New York application.[1] Leo V. Carmody (Carmody) filed an opposition to the petition for reconsideration and Mobilfone has replied. We will deny reconsideration for the reasons which follow.

I. BACKGROUND

2. On January 25, 1983, Poughkeepsie Radio, Inc., predecessor-in-interest to Hudson Valley Mobile Telephone, Inc. (Hudson Valley), a non-wireline carrier, filed an application (File No. 21642-CD-P-1-83) to construct a new one-way signaling facility on frequency 900 MHz at Poughkeepsie, New York.[2] The Hudson Valley application appeared on Public Notice as accepted for filing on February 9, 1983. [3] On November 14, 1984, Hudson Valley filed an amendment to the application to change the location from Poughkeepsie, New York to Ulster, New York and to change the frequency from 900 MHz to 152.84 MHz.[4] On March 25, 1985, Mobilfone filed an application to modify its existing one-way paging facility to operate on frequency 152.84 MHz at Monticello, New York (File No. 22505-CD-P/L-1-85).[5] The Monticello application was placed on public notice on May 8, 1985. By letter dated January 5, 1987, the MSD dismissed Mobilfone's Monticello application on the grounds that it was cut-off from comparative consideration with the application filed by Hudson Valley for the same frequency in Ulster, New York, pursuant to Section 22.31(c) of the Commission's Rules. In its letter, the MSD indicated that the Common Carrier Bureau (Bureau), in its *Order on Reconsideration*, 61 Rad. Reg. 2d (P&F) 95 (Com. Car. Bur., 1986) (*Order*), had accepted for filing Hudson Valley's application *nunc pro tunc* as of November 14, 1984 (the date Hudson Valley had filed its amendment to change location and frequency).[6] The MSD letter indicated that Mobilfone's captioned application, filed on March 25, 1985, was therefore cut-off from comparative consideration.[7]

II. CONTENTIONS

3. In its petition for reconsideration, Mobilfone acknowledges that the Bureau's *Order* accepted for filing *nunc pro tunc* Hudson Valley's amendment to change frequency from 900 MHz to 152.84 MHz. Mobilfone, nevertheless, contends that the Commission failed to provide public notice of its acceptance of Hudson Valley's amended application and, therefore, did not establish a Section 22.31 cut-off period necessary to dismiss its Monticello application.[8]

4. Mobilfone contends that even if a cut-off period for filing mutually exclusive applications with Hudson Valley's Ulster application can be established, the Commission erred by not providing adequate public notice that it accepted Hudson Valley's amendment. In this regard, it argues that the Commission never included the amendment in its Public Notices of applications and major amendments accepted for filing. Furthermore, Mobilfone contends that the Commission never included the information provided in the amendment in the FCC Staff Study List. (The FCC Staff Study List provides the public with information concerning authorized frequencies and pending applications). According to Mobilfone, the Commission's failure to provide adequate public notice of its acceptance of Hudson Valley's amended application fails to satisfy the notice requirements of Section 309(b) of the Communication Act of 1934, as amended (Act), and Sections 22.27(a)(1)[9] and 0.445(e) of the Commission's Rules.[10] Mobilfone argues that the lack of public notice of Hudson Valley's amendment deprived Mobilfone of its right to file a petition to deny Hudson Valley's amendment, pursuant to Section 309(d) of the Act and Section 22.30 of the Commission's Rules. It asserts that the Commission's public notices and other official records are the official basis for determining mutual exclusivity, citing *B&B Communications, Inc.*, Mimeo No. 6824 (Com. Car. Bur., released September 11, 1986); *Smith Communications Systems, Inc.*, Mimeo No. 3654 (Com. Car. Bur., released April 9, 1986), and *Charles Rotkin d/b/a Northeast Communications*, Mimeo No. 2711 (Com. Car. Bur., released February 22, 1985), *recon. denied*, Mimeo No. 7155 (Com. Car. Bur., released September 23, 1985).

5. Mobilfone maintains that but for the Commission's failure to give public notice of Hudson Valley's amended application, it would have amended its application to protect Hudson Valley's proposed operation from interference. Therefore, with its petition for reconsideration, it submits an amended application which provides interference protection to Hudson Valley's Ulster application as well as to other stations which it believes it was required to protect when it originally filed its application. Mobilfone concludes that the Bureau should grant its Monticello application an exemption from the cut-off rules, rescind the dismissal of its application, and reinstate its amended application *nunc pro tunc*. According to Mobilfone, *nunc pro tunc* acceptance of its amended application will correct the Commission's processing error and protect the legitimate interests of all parties.

6. In opposition to the petition for reconsideration, Carmody disputes Mobilfone's claim that the Commission provided no public notice of Hudson Valley's amended

application. It asserts that the release of the Bureau's *Order* provided Mobilfone with public notice that the Bureau accepted *nunc pro tunc* Hudson Valley's amendment to change frequency from 900 MHz to 152.84 MHz. In support, it points out that Section 1.4(b)(2) of the Commission's Rules provides that public notice commences on the day after the date that a document is released by the Commission. With respect to Mobilfone's claim that Hudson Valley's amended application never appeared in the Commission's Public Notice list, Carmody maintains that Section 22.27 of the Commission's Rules does not require that the public notice accepting applications and amendments appear in any particular form. Citing *Central Mobile Radio Phone Service*, 65 FCC 2d 648, 651 (1977), Carmody asserts that notice is sufficient when the applicant's name, the requested frequency and location, file number and the call sign are disclosed. Carmody asserts that the Bureau's *Order* satisfies the notice requirements because it provided Mobilfone and the public with more information concerning Hudson Valley's amendment than the Commission's Public Notice list provides.

7. Furthermore, Carmody claims that Mobilfone was not denied its statutory right to challenge the Bureau's acceptance of Hudson Valley's amendment, because Mobilfone had the opportunity but failed to file a petition to deny Hudson Valley's amended application within 30 days of the release date of the Bureau's *Order*, as required by Section 22.30(a)(4) of the Commission's Rules. According to Carmody, Mobilfone's failure to file a petition to deny Hudson Valley's amended application within the required time period renders Mobilfone's arguments that it suffered injury, or that equitable consideration warrant the reinstatement of its Monticello application, meritless. Finally, Carmody asserts that Mobilfone cannot now file a corrective amendment or have its application reinstated *nunc pro tunc*. Carmody argues that under *Moore's Service*, 86 FCC 2d 787, 795 (Com. Car. Bur., 1981), once an application, such as Mobilfone's Monticello application, has been properly dismissed on the grounds that it is cut-off from comparative consideration, it cannot later be cured.

III. DISCUSSION

8. Initially, we reject Mobilfone's contention that the Commission failed to provide public notice necessary to establish a cut-off period for filing mutually exclusive applications with Hudson Valley's application. In this regard, we note that in *Leo V. Carmody*, *supra* note 7, the Commission granted the Hudson Valley amended application for Ulster, New York, referenced above. In so doing, the Commission found that Hudson Valley's amended application should have been given Section 22.23(g)(2)[11] treatment. The Commission further pointed out that Hudson Valley's original application was listed as accepted for filing on Public Notice No. 158 (February 9, 1983). Therefore, because Mobilfone's application for Monticello, New York was filed on March 25, 1985, long after the 60 day cut-off date established by the February 9, 1983 Public Notice, it was untimely filed and not entitled to comparative consideration with Hudson Valley's application.

9. Second, we do not believe that Mobilfone was deprived of notice, guaranteed by Section 309(b) of the Act, that the Bureau had accepted Hudson Valley's November 14, 1984 amendment to change frequencies from 900 MHz to 152.84 MHz. The earliest date upon which public notice of Hudson Valley's amended application could have been established was September 12, 1986, the release date of the Bureau's *Order* which accepted for filing Hudson Valley's amended application. The *Order* provided the file number, name of the applicant, nature of the application, frequency and location, which was all the information necessary to guarantee "full and explicit notice." *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968). *See also Central Mobile Radio Phone Service*, *supra* para. 6. Therefore, we conclude that the *Order* provided sufficient information to comply with Section 309(b) of the Act.[12] Mobilfone, having received adequate notice that the Bureau accepted for filing Hudson Valley's amended application, failed to protect its interests in the Monticello application within 30 days of the date of public notice established by the release of the Bureau's *Order*.[13]

10. We also reject Mobilfone's contention that the alleged lack of notice through the Study List deprives it of its Section 309(b) rights. As the Bureau stated in *Smith Communications*, *supra* para 4, the Study List "is made available to the public as a matter of convenience to be used as an aid and reference guide for parties with a need to review a list of applications pending before the Commission. It was never intended to supplant our public notices and other official Commission records . . . ." *Id.* at 3. The cases cited by Mobilfone do not support its claim that it did not receive adequate notice of Hudson Valley's amended application. *B & B Communications, Inc., supra; Smith Communications Systems, Inc., supra* ; and *Charles Rotkin d/b/a Northeast Communications*, *supra*, stand for the proposition that applicants as well as prospective applicants may not rely on the FCC Staff Study Lists to determine co-channel interference, but rather must rely only on public notice and other official Commission records as a basis for determining mutual exclusivity. Section 0.434(e) of the Rules explicitly cautions that the Commission data bases are unofficial listings that should not be relied on by the public because in some cases the lists may not be consistent with the primary sources of information. Therefore, Mobilfone's reliance on the Study List in no way deprived it of its public notice rights.

11. Finally, we reject Mobilfone's argument that it was deprived of its right to file a Section 309(d) petition to deny against Hudson Valley's amended application. Despite Mobilfone's knowledge that the Bureau, in its *Order*, accepted for filing Hudson Valley's amended application, it failed to file either a petition to deny or dismiss Hudson Valley's amended application or a petition for reconsideration of the *Order* within the required time periods. Mobilfone has presented no persuasive arguments as to why a petition to deny or reconsideration should be considered at this late date. Moreover, Mobilfone has presented no substantive arguments as to why Hudson Valley's application, as amended, should have been denied.

12. Since Mobilfone's Monticello application was filed after the cut-off date for filing mutually exclusive applications with Hudson Valley's first-filed application for Ulster, New York, this late-filing renders the application defective pursuant to Section 22.20(b)(7) of the Commission's Rules. Accordingly, we affirm the MSD's dismissal of Mobilfone's application. The application may not now be amended and it cannot be reinstated *nunc pro tunc*.

ORDERING PARAGRAPH

13. Accordingly, IT IS ORDERED That the Petition for Reconsideration filed by Mobilfone of Northeastern Pennsylvania, Inc., File No. 22505-CD-P/L-1-85, IS HEREBY DENIED and the Mobile Services Division's dismissal of Mobilfone's application IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Mobilfone provides two-way and one-way radio common carrier service in Pennsylvania and New York.

[2] Applicants for the 900 MHz paging frequencies do not apply for a specific frequency. While they may state a preference for a frequency, they are not guaranteed that frequency. The Commission assigns a frequency to the applicant based on fixed mileage separation criteria.

[3] Public Notice No. 158 (February 9, 1983).

[4] By letter dated February 19, 1985, the MSD returned the Hudson Valley application as defective for not including a request for a waiver to use the 152.84 MHz frequency, a wireline frequency. The MSD also declined to grant Hudson Valley a Section 22.23(g)(2) exemption, which would have permitted Hudson Valley's amended application to retain its original January 25, 1983 filing date.

[5] Mobilfone's application proposed to modify its existing authorization for PLMS Station KNKB359 at Monticello, New York (File No. 24326-CD-P/L-1-82) by changing the authorized frequency from 35.22 MHz to 152.84 MHz.

[6] In so doing, the Bureau found that Hudson Valley's application did contain a waiver request to apply for the 152.84 MHz frequency, but again denied Hudson Valley's request to retain its original filing date under Section 22.23(g)(2).

[7] On application for review of the Bureau's *Order*, the Commission, in *Leo V. Carmody*, FCC 90-80 (released March 1, 1990), granted Hudson Valley's application and found that it should have been given Section 22.23(g)(2) treatment. Accordingly, the 60 day cut-off period for filing mutually applications with Hudson Valley's first-filed application began on February 9, 1983, the public notice date for Hudson Valley's application as originally filed. *See* paragraph 8, *infra*.

[8] The cut-off rule provides in pertinent part that "an application will be entitled to comparative consideration with one or more conflicting applications . . . if the application is received by the Commission in a condition acceptable for filing . . . sixty (60) days after the date of the public notice listing the first of the conflicting applications as accepted for filing . . . ." Section 22.31(b)(2)(i).

[9] Section 22.27(a)(1) states that "[a]t regular intervals, the Commission will issue a public notice listing the acceptance for filing of all applications and major amendments thereto . . . ."

[10] Section 0.445 states in part that "[n]o person is expected to comply with any requirement or policy of the Commission unless he has actual notice of that requirement or policy or a document stating it has been published . . . ."

[11] Section 22.23(g)(2) of the rules (formerly Section 22.31 (e)(2)) provides that applications will not be considered newly filed if an amendment is filed to change frequency and the amendment resolves frequency conflicts with other pending applications without creating new or increased frequency conflicts. In short, Section 22.23(g)(2) was meant to allow an applicant in certain circumstances to amend its application to another available frequency while retaining its original filing date.

[12] Similarly, we find that the information provided in the Bureau's *Order* complies with the notice requirements of Sections 22.27(a) and 0.445(e) of the Rules.

[13] Mobilfone could have filed a petition to deny against Hudson Valley's application. *See infra* para. 12. It is also possible that Mobilfone could have amended its application prior to dismissal to resolve the frequency conflict.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-476

In the Matter of

New York Metropolitan Area
Region 8 Public Safety Plan

ORDER

Adopted: December 4, 1990; Released: December 11, 1990

By the Chief, Land Mobile and Microwave Division:

1. The Private Radio Bureau and the Office of Engineering and Technology, acting under delegated authority, accepted the New York Metropolitan Area (Region 8) Public Safety Plan (Plan) on May 22, 1989, 4 FCC Rcd 4457 (1989).

2. By letter dated September 28, 1990, the Region proposed to amend its Plan. The proposed amendment would modify the list of frequency allotments currently in the Plan. The Commission placed the letter on Public Notice for comments, 55 FR 41766 (10-15-90), and received no comments.

3. We have reviewed the proposed amendment to the Region 8 Plan and, having received no comments to the contrary, conclude it furthers the interests of the eligible entities within the Region.

4. Accordingly, IT IS ORDERED, That the Public Safety Radio Plan for the New York Metropolitan Area (Region 8) IS AMENDED, as set forth in the Region's letter of September 28, 1990. This Amendment is effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile & Microwave Division

Will McGibbon
Chief, Spectrum Engineering Division

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-517

In The Matter of

Revocation of License of

MICHAEL D. HARRISON
Amateur Radio Station WB2PTI

Order to Show Cause Why Amateur Radio Station License Should Not Be Revoked.

Appearances

Michael D. Harrison, pro se; *Eric J. Malinen, Esq.* and *Thomas D. Fitz - Gibbon, Esq.* on behalf of the Chief, Private Radio Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: November 29, 1990; Released: December 11, 1990

PRELIMINARY STATEMENT

1. This is a ruling on a Motion For Summary Decision filed by the Private Radio Bureau ("Bureau") on November 1, 1990, and a related ruling on a Motion For Evidentiary Hearing filed by Michael D. Harrison ("Harrison") on November 5, 1990. An Opposition To Motion For Evidentiary Hearing was filed by the Bureau on November 20, 1990. There has been no Opposition filed by Harrison to the Bureau's Motion for Summary Decision. *See* 47 C.F.R. §1.251(b) (fourteen days allowed to oppose motion for summary decision).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

2. On September 18, 1990, pursuant to Sections 312(a)(2) and (c) of the Communications Act [47 U.S.C. §312(a)(2) and (c)], the Bureau issued an *Order To Show Cause* in PR Docket No. 90-517 directing Harrison to show cause why his license for Amateur Radio Station WB2PTI should not be revoked.

3. There is no merit to Harrison's motion for an evidentiary hearing. Harrison merely states that a plea bargained conviction does not bar Harrison from an evidentiary hearing and Harrison asks the Presiding Judge to be liberal in granting his request. But the Bureau's case is based on a criminal conviction that is not in dispute. The fact that it is the result of a plea is irrelevant. It is still a conviction which Harrison is estopped from challenging. *See Character Qualifications*, 102 F.C.C. 2d 1179, 1205-06 n. 64 (1986) (convictions based on *nolo contendere* plea can be considered for character determinations). *See also Character Qualifications*, 5 F.C.C. Rcd 3252 (1990) (licensee's willingness to commit felonies bears on Commission's confidence that licensee will conform to FCC rules and policies). In light of the evidence, there would be no purpose in holding a hearing.

4. The Order To Show Cause alleges and, based on the Indictment and Judgment entered in *United States* v. *Harrison* (No. U.S.D.C. E.D. N.Y., CR89-00575, it is found, as set forth below, that Harrison's license for Amateur Radio Station WB2PTI should be revoked because such matters would have prevented the granting of Harrison's original application under Section 312 of the Communications Act.

5. On April 19, 1990, a judgment was entered and sentence was imposed pursuant to Harrison's guilty plea to five counts of a 50 count indictment. (*See* Attachment to Bureau's Motion For Summary Decision.) Harrison was sentenced to 21 months in prison, received a fine in the amount of $125,000.00, was required to pay restitution in the amount of $100,073.00 to the victims of his crime, and was required to serve three years probation after his incarceration. Harrison also was required to pay confinement costs of $1,210.00 per month.

6. Harrison (a/k/a "John McNamara" and "Mike Harrison") was found to have carried out a scheme to defraud between August 1988 and January 9, 1989, whereby he placed ads in issues of *73 Amateur Radio Magazine* for what was falsely represented as a Uniden product, "the 2510 ten meter mobile transceiver." Similar ads were run by Harrison in *Ham Trader*, *Yellow Sheets*, and *Popular Commercial Magazine*. Although not authorized to sell Uniden products or to use the Uniden name, Harrison accepted orders and payments in excess of $100,000.00 in response to his ads. Harrison failed to ship the merchandise and he kept the funds. *See* Indictment at Paras. 1-8.

7. Harrison has been found guilty of criminally defrauding amateur radio operators and therefore he is found here to lack the requisite character ever to hold a Commission license. The fraudulent nature of his criminal conduct evinces a likelihood that he will not comply with the Communications Act in the future. *See Character Qualifications*, 102 F.C.C. 2d 1179, 1183 (1986). *See also Character Qualifications*, 5 F.C.C. Rcd 3525 (1990). The Bureau is correct in asserting that Harrison, who stands convicted of felonious larceny in the amateur radio market, cannot be relied on to be truthful in his dealings with the Commission or to comply with the Communications Act or the Commission's rules. *Compare Telestar, Inc.*, 3 F.C.C. Rcd 2860, 2866 (Comm'n 1988).

8. There has been no Opposition or counter-declaration filed by Harrison to rebut the above facts. Nor would a contest of the facts be considered since the doctrine of collateral estoppel establishes those facts as a matter of law. *See Kannapolis Television Co. Joint Venture*, 1 F.C.C. Rcd 1037, 1038-39 (Review Bd 1986) (Commission accepted findings of willful misstatements by Bankruptcy Court as conclusive). The Courts have upheld the Commission's invocation of collateral estoppel in licensing cases. *See e.g., Gordon Country Broadcasting Co. v. FCC*, 446 F.2d 1335, 1338 (D.C. Cir. 1971). *See also Montgomery County Media Network*, 4 F.C.C. Rcd 3749, 3750 (Review Bd. 1989).

9. The Commission's rules provide that in considering a motion for summary decision:

> The party filing the motion - - - must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). As the moving party, the Bureau has the burden of establishing that summary decision would be appropriate based on its papers. *Summary Decision Procedures*, 34 F.C.C. 2d 485, 487-88 (1972). The Bureau is found to have sustained this burden.

10. In light of the conclusive evidence found in the U.S. District Court for the Eastern District of New York with respect to Harrison, there is no genuine issue of material fact that remains to be resolved. *See Parklane Hosiery Co., Inc. v. Shore*, 99 S.Ct. 645, 654 n. 23 (1979) (whole premise of collateral estoppel is that once an issue has been resolved in a prior proceeding there is no further factfinding function to perform). Therefore, a summary decision against Harrison is appropriate and his license must be revoked.

RULINGS

IT IS ORDERED that the Motion For Evidentiary Hearing filed November 5, 1990, by Michael D. Harrison IS DENIED.

IT IS FURTHER ORDERED that the Motion For Summary Decision filed by Private Radio Bureau IS GRANTED in favor of the Bureau and against Harrison.

IT IS FURTHER ORDERED pursuant to Section 312 of the Communications Act [47 C.F.R. §312] that the license of Michael D. Harrison for Amateur Radio Station WB2PTI IS REVOKED.

IT IS FURTHER ORDERED that the Prehearing Conference and Hearing set for January 9, 1991 ARE CANCELLED. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTE

[1] This *Summary Decision* disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
Released: December 11, 1990

ALLTEL SERVICE CORPORATION FILES PETITION FOR WAIVER OF PART 36 RULES TO CONSOLIDATE ITS JAMESTOWN STUDY AREA OF ALLTEL NEW YORK WITH THAT OF CLYMER TELEPHONE COMPANY

(PUBLIC COMMENT INVITED)

On November 21, 1990, ALLTEL Service Corporation (ALLTEL), on behalf of its telephone operating affiliates, ALLTEL New York, Inc. and Clymer Telephone Company, Inc. of New York, filed a petition for waiver of the definition of "study area" contained in Part 36 of the Commission's Rules. This waiver would allow ALLTEL to consolidate its Jamestown study area of ALLTEL New York with that of the Clymer Telephone Company, Inc.

Parties may file comments on this petition no later than **December 28, 1990.** Replies should be filed by **January 11, 1991.** Comments should reference AAD 90-25. A copy of each pleading should be sent to Gene Gold, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division, public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Gene Gold, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Applications of

CONTINENTAL SATELLITE CORPORATION, et al. DBS 86-01-MP

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 1990; Released: December 11, 1990

By the Commission:

1. We consider here the petition of Dominion Video Satellite, Inc. (Dominion), for partial reconsideration of our decision in *Continental Satellite Corporation*, 4 F.C.C. Rcd. 6292 (1989) (" *Continental* ").[1] There, we took a variety of actions as to applicants and permittees in the direct broadcast satellite (DBS) service. Prior to *Continental*, Dominion held a construction permit for two, eight-channel DBS satellites (a total of 16 separate channels) at an eastern orbital position (119^{0}W), one of which would provide eight channels of DBS service to the eastern half of the country and the other eight channels to the western half.[2] In *Continental*, we determined that signals covering only the western half of the country from an eastern orbital position were not an efficient use of the orbital positions and channels allocated for DBS use. Accordingly, we concluded that we should not authorize a DBS system proposing to provide eastern and western half-CONUS coverage from a single eastern orbital position. Instead, such coverage should only be provided from east/west pairs of orbital positions. Dominion and other DBS permittees had been previously granted provisional authorizations inconsistent with that conclusion. We therefore modified those outstanding authorizations accordingly.

2. Dominion's position is that our decision in *Continental* assertedly failed to take into account its application (DBS 86-01-MP) to modify its DBS system,[3] which was filed before *Continental*. As a result, Dominion believes it should have been awarded three additional channels at its eastern and western orbital positions, for a total of eleven pairs of channels. The following will aid in understanding this case.

3. In its request for modification, Dominion conditionally sought to reconfigure its DBS system to operate from 119^{0}W with: (1) one ten-channel satellite providing five eastern and five western half-CONUS channels; and (2) two, three-channel satellites that would provide a total of six full-CONUS channels. Thus, each half of the country would receive eleven Dominion DBS channels -- six full-CONUS and five half-CONUS. Dominion stated that the modified system would not require orbital or spectrum resources beyond that already authorized in its outstanding construction permit.[4] Thus, the application was designated a minor change in the Public Notice accepting the application for filing.

4. In its application, Dominion stated that its "acquisition of the [three-channel] satellites [that it proposed to implement its modified DBS system] is contingent on its ability to pre-sell its DBS programming service. Unless Dominion meets a set financial target in December, 1986, it is under no obligation to purchase the [three-channel] satellites and it will adhere to the system configuration covered by its existing construction permit . . . ." Footnote omitted. Although Dominion later stated that the December, 1986 date had been extended, at no time did it subsequently stat : that it had successfully met the condition as to its acquisition of both the satellites. Dominion subsequently submitted various proposals, all containing various options, alternatives or contingencies.[5] As a result, Dominion did not have a viable application on file at the time of the *Continental* decision. Accordingly, there was no basis for granting Dominion a conditional construction permit for additional channels. Consistent with its authorized facilities and with the paired east/west orbital requirement, we directed Dominion in *Continental* to specify which of its eight authorized eastern channels it wished to retain at 119^{0}W and to request an orbital position and eight channels for its western satellite. 4 F.C.C. Rcd. at 6301. That authorization is still outstanding. We believe that a request for additional spectrum should follow normal procedures: that is, an appropriate application, followed by public notice and an opportunity for interested parties to comment.

5. Accordingly, IT IS ORDERED, That the August 29, 1989, petition of Dominion Video Satellite, Inc., for partial reconsideration of our decision in *Continental Satellite Corporation*, IS DENIED.

6. IT IS FURTHER ORDERED, That the minor modification application (DBS 86-01-MP) filed by Dominion Video Satellite, Inc., IS DISMISSED.

7. The Mass Media Bureau shall mail copies of this decision to the parties by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Tempo Satellite, Inc. (Tempo), filed an opposition to Dominion's petition.

[2] Proposals to transmit to half of the continental United States will be referred to as providing half-CONUS coverage, while proposals to serve the entire country from one orbital position will be designated as providing full-CONUS coverage.

[3] The modification application also requested a four-year extension of the six-year construction period specified in 47 C.F.R. § 100.19(b). The Commission granted that part of Dominion's request in *United States Satellite Broadcasting Co.*, 3 F.C.C. Rcd. 6858 (1988). That action is final and is not before us here.

[4] Domestic DBS orbital positions are a minimum of 9^0 apart and receiving antennae in this service are designed to differentiate signals tranmitted from satellites operating at that spacing. As a result, the same channel can be reused at all U.S. orbital positions without causing objectionable interference. Dominion's proposal to use its sixteen channels in the manner described in the text would not, therefore, interfere with other DBS permittees using the same channels, but from different orbital positions. At the time Dominion filed its application, its proposal to change six of its channels to full-CONUS coverage was considered a minor change. It was not until our decision in *Continental* that we classified as a major change a modification from complementary pairs of half-CONUS signals to the same number of full-CONUS signals. *Continental*, 4 F.C.C. Rcd. at 6923 (para. 7) and 6297 (para. 36).

[5] In the future, we do not propose to accept contingent proposals such as submitted by Dominion. Nonetheless, we accepted Dominion's application based on the expectation that it would eliminate the contingency promptly. That expectation was not realized. In any event, in January, 1987, Dominion reported that it had an extension of the date by which it had to meet the specified financial target that would trigger its obligation to buy the two, three-channel satellites. In February, 1988, Dominion was still equivocal, stating that it would need to reconfigure its system, in "the event [Dominion] acquires one or more of the GE/RCA 3000 Series (3 channel) DBS satellites ..." Both of those satellites would have been needed to implement the DBS system proposed in the modification application. The same letter states that Dominion's business plan "calls for 8 broadcast channels to be available in all parts of the U.S. (. . . 8 East and 8 West)," which is inconsistent with the modification application. Dominion subsequently stated that on May 25, 1988, it had "signed an agreement with GE . . . purchasing one of the DBS 3000 [three channel] Series DBS spacecraft, with an option to purchase the second spacecraft . . . on or before July 31, 1988." The accompanying letter from GE is not so affirmatively worded. It states that there was a signed "Letter Agreement" "regarding the procurement" of a single, three-channel satellite, and makes no reference to an option to buy the required second satellite. GE's letter is not dispositive, in light of the earlier contingent agreement. Subsequently, Dominion stated in November, 1988, that it was still "considering an interim plan which would co-locate two DBS satellites . . . (3 channels each)," which is still not a firm commitment to pursue its modified proposal. By December 5, 1988, Dominion could not have implemented the proposal set out in the modification application, in light of its statement that "GE Astro notified [Dominion] that it had sold the second spacecraft to an international customer." On July 18, 1989, just prior to the *Continental* decision, Dominion stated that it had suspended payment on the remaining three-channel satellite. According to the payment schedule previously submitted, two payments were scheduled to have been made at that time, the first of which was due on April 1, 1989. In sum, the record does not disclose a specific, noncontingent proposal that could have been acted upon. If anything, the record shows Dominion's abandonment of its plan to use three-channel satellites prior to our decision in *Continental*. After *Continental*, on July 3, 1990, Dominion advised the Commission that the last three-channel satellite had been sold by the builder. Because Dominion explicitly rested its minor modification application upon the availability of two specified satellites, and because those satellites are no longer available to Dominion, its modification application will be dismissed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

O.R. ESTMAN
d/b/a SATELLITE PAGING

Request for Placement in
Lottery No. PMS-31;

For new frequency File No. 21057-CD-P/ML-01-89
931 MHz for
station KNKK333 at Branchville
and Manahawkin, New Jersey;

For new frequency File No. 21068-CD-P/ML-01-89
931 MHz for
station KNKJ922 at Martinsville
and Alpine, New Jersey;

For new frequency File No. 21060-CD-P/ML-01-89
931 MHz for
station KNKJ333 at Burlington,
New York and Allentown, New Jersey.

ORDER ON RECONSIDERATION

Adopted: December 3, 1990; Released: December 11, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On August 23, 1989, the Mobile Services Division (MSD) denied the request of O. R. Estman, Inc. d/b/a Satellite Paging (Satellite Paging), filed August 3, 1989, for placement of its captioned applications in Lottery No. PMS-31 for 900 MHz paging frequencies for the New York City Metropolitan area. *O. R. Estman d/b/a Satellite Paging (Estman)*, 4 FCC Rcd 6827 (Mob. Serv. Div. 1989). The MSD held the lottery on August 23, 1989, among five applicants for four available 900 MHz frequencies. Satellite Paging filed a Petition for Reconsideration of the MSD's order. Opposition pleadings were filed by three of the four lottery winners. Responsive pleadings were also filed. *See* para. 6 and note 5, *infra*.

II. BACKGROUND

2. On June 15, 1988, the Commission issued Public Notice, No. PMS-88-38, Mimeo No. 3349 ("1988 Public Notice"), which listed the application of Page America of New York, Inc. (Page America) for 900 MHz paging frequencies in the New York area as accepted for filing. On December 13, 1988, Satellite Paging filed the captioned 900 MHz applications for the New York City metropolitan area. On July 17, 1989, the Commission announced in Public Notice, Mimeo No. 3642, that Lottery No. PMS-31 for 900 MHz frequencies in the New York area was scheduled for August 23, 1989. In addition to Page America, the July 17, 1989, Public Notice listed four other applicants to be considered in the lottery: Contact Communications, Inc., (Contact), Com/Nav Marine, Inc. (Mtel Paging, Inc.),[1] Tri-State Radio Company (Tri-State), and Enhanced Telecommunications Services, Inc., (Enhanced). Satellite Paging was not listed. Satellite Paging requested on August 3, 1989, that the Commission include its applications in the lottery. The MSD informed Satellite Paging that its applications would not be included in Lottery No. PMS-31 because it had not filed its applications within the 60 day cut-off period of the June 15, 1988 Public Notice listing Page America's application as acceptable for filing. After holding Lottery No. PMS-31, the MSD granted construction authorizations to the first four applicants selected, Mtel Paging, Inc., Tri-State, Contact, and Page America. *See* Public Notice, PMS-89-51-A (released September 20, 1989). Satellite Paging then filed the subject petition for reconsideration.[2]

III. CONTENTIONS OF THE PARTIES

A. Satellite Paging

3. In its petition, Satellite Paging argues that the MSD's decision to exclude Satellite Paging from Lottery No. PMS-31 violated the Administrative Procedure Act (APA)[3] because no notice was given by the Commission to the public of which frequencies were being awarded in Lottery No. PMS-31 or of the procedures that would be used in awarding them. Further, Satellite Paging asserts that the MSD erred in relying on Public Notice, Mimeo 4395 (Com. Car. Bur. released May 24, 1984) ("1984 Public Notice"), as providing notice to 900 MHz applicants concerning the procedures to be used in awarding 900 MHz frequencies. The 1984 Public Notice, Satellite Paging notes, was issued after the Commission partially lifted a freeze on the filing of 900 MHz applications and opened a filing window for 900 MHz frequencies for particular locations. Applicants at that time, Satellite Paging argues, could easily determine the cut-off date for filing applications by watching for the first application to appear on public notice and then file competing applications within 60 days. However, Satellite Paging contends that now it is impossible for applicants to discern whether any 900 MHz frequencies are available. These frequencies, Satellite Paging asserts, become available as authorizations expire and then become unavailable when the Commission assigns them without providing sufficient, timely information to the public. In the instant case, Satellite Paging contends, the MSD gave no notice of the specific frequencies that would be awarded in Lottery No. PMS-31.

4. Further, Satellite Paging asserts that the procedures for assigning 900 MHz frequencies do not give sufficient notice to the public. First, Satellite Paging argues that 900 MHz applications are not frequency-specific due to the unique Commission procedure used for assigning 900 MHz frequencies and appear on public notice with no reference to specific frequencies. As a result, the public is not in a position to know whether any specific 900 MHz frequencies are available.[4] Even if their availability is ascertainable, asserts Satellite Paging, 900 MHz frequencies may either have been already assigned, or contested

by applicants that are mutually exclusive. Third, Satellite Paging contends that even if there are no frequencies available, the MSD staff continues to accept and hold 900 MHz applications, a practice not in accord with the 1984 Public Notice.

5. Satellite Paging adds that contrary to the MSD's assertion in *Estman*, 4 FCC Rcd at 6827, knowledge of the site locations, by itself, is insufficient to give notice to applicants of which 900 MHz frequencies are available, when the number of frequencies available in the vicinity where an applicant wants to apply remains unknown. Satellite Paging requests, therefore, that the Bureau reverse the MSD and hold a new lottery.

B. Opposing Parties

6. Page America, Contact, and Mtel Paging[5] filed oppositions to Satellite Paging's petition. Contact and Page America assert that the 1984 Public Notice set forth that applications for 900 MHz frequencies were to be filed in accordance with the Commission's standard notice and cut-off procedures pursuant to Section 22.31 of the rules. Contact contends that the 1984 Public Notice clearly indicated to Satellite Paging how 900 MHz applications would be processed and informed potential applicants that the cut-off date would be set at 60 days after notice of the first filed application. Contact points out that a public notice for 900 MHz paging applications differs from public notices for applications for other mobile service frequencies only to the extent they do not specifically identify the frequency which is to be allocated ultimately to the applicant. Contact asserts that neither the identity nor the number of available frequencies was a necessary requirement in the 1988 public notice. Contact argues that even if Satellite Paging had been informed of the number of frequencies available, it would have had to file its applications by the same cut-off date set by the 1988 Public Notice of Page America's application in order to be considered timely filed.

IV. DISCUSSION

7. We reject Satellite Paging's contention that there was insufficient notice of the procedures to be utilized in awarding 900 MHz frequencies. We find that Satellite Paging had notice of the procedures for the filing and processing of applications for the 900 MHz frequency band and that such notice was consistent with APA requirements. First, the Rule Making for the 900 MHz frequency band clearly set forth the procedure for assigning the thirty-seven frequencies for 900 MHz local paging service. *See Paging Systems - DPLMRS*, 89 FCC 2d 1337, 1355-57, 1359 (1982). Therein, the Commission stated that applicants for these frequencies would not specify a particular frequency when applying, but that the staff would choose and assign the frequencies to the applicants. *Id.* at 1356. The Commission did not define service areas for this frequency band, but instead adopted a procedure based upon uniform fixed mileage criteria of 70 miles between all co-channel 900 MHz stations. Thus, 900 MHz applications are mutually exclusive when their proposed transmitting sites are within that specified distance of each other and there are insufficient frequencies available to satisfy pending applications. The Commission adopted these procedures to minimize mutually exclusive situations and best expedite the processing of 900 MHz applications. *Id.* at 1359. The Commission further stated that, "[i]f mutually exclusive situations do arise, the procedures for dealing with mutually exclusive applications prevailing at that time will be followed." *Id.* at 1357.

8. After the Commission initially assigned 900 MHz frequencies in 1983 and 1984, the Bureau reopened the 900 MHz frequency band for applications, in accordance with the direction of *Paging Systems - DPLMRS*, *id.* at 1364. The 1984 Public Notice announced this reopening, and in doing so reminded all applicants that the normal "notice and cut-off" procedures applicable to all public land mobile services (PLMS) applications, set forth in Section 22.31(c), of the rules, would apply to 900 MHz applications as well.[6]

9. Consistent with Section 22.31(c), our procedures for assigning frequencies in the 900 MHz band are as follows. The public notice listing an application for the 900 MHz frequency band starts a 60-day period for the filing of mutually exclusive applications.[7] All applications to offer service within 70 miles of the first-filed application that are filed within the 60 day period are considered mutually exclusive when there are more applications filed than there are available frequencies. All applications filed within the 60 day cut-off period of the first-filed application are treated as a "processing group." All applications in the processing group are placed in a lottery. 47 C.F.R. § 22.31(b). After the lottery is held, frequencies are assigned based on the results of the lottery and the locations proposed by the applicants. However, when there are enough frequencies to satisfy all the applications in the processing group, no lottery is held and the first-filed application is granted. The public notice date of the next-filed application in the processing group starts a new 60 day cut-off period for a new processing group. This process continues until there are more applications in a given processing group than there are frequencies available for them. At that point, a lottery is held for those applications.

10. With respect to Satellite Paging's applications, the June 15, 1988 Public Notice announcing that Page America's application was acceptable for filing, started the 60-day period for filing 900 MHz applications for the New York City Metropolitan area. Satellite Paging filed its application on December 13, 1988, and thus was not filed before the cut-off date. We conclude that the MSD properly excluded Satellite Paging's application from the processing group of applications that were sent to Lottery No. PMS-31.

11. Further, Satellite Paging's contentions regarding insufficient notice of the availability of 900 MHz frequencies are meritless. As explained above, in order to expedite the processing of 900 MHz applications, procedures were adopted whereby the public notices listing applications as acceptable for filing do not list specific frequencies but, rather, state that the application is for a permit and license to operate on the 900 MHz frequency band. In addition, as for all PLMS frequencies, the public notices provide the transmitting site location, file number and applicant's name and whether the application is for a new facility or a modification of license. As for all PLMS services, the staff does not announce which frequencies are available. However, other public notices involving the 900 MHz band do list specific frequencies. For example, the public notices granting authorizations in the 900 MHz band do list the specific frequencies assigned by the staff. Moreover, public notices involving 900 MHz frequency applications for modifications of existing licenses and the termination of licenses also list specific frequencies, as do

public notices for all frequencies in the PLMS. Thus, contrary to Satellite Paging's argument, by carefully monitoring the Commission's public notices, applicants can determine which frequencies are available for particular locations on the 900 MHz frequency band. Moreover, if applicants are in doubt as to the availability of a particular frequency for the location in which they are interested, they may file an application for that frequency to protect their rights.[8]

12. Moreover, we reject Satellite Paging's contention that knowledge of only the transmitting site location is insufficient for an applicant to know when to file applications for 900 MHz frequencies. From the public notices listing 900 MHz applications as accepted for filing, the public can ascertain the transmitting site locations and the number of applications filed in a particular geographic area. This information is sufficient for a prospective applicant to determine when to file a competing, timely filed application.

13. Finally, Satellite Paging incorrectly asserts that the staff holds applications until frequencies become available, contrary to the 1984 Public Notice. That Public Notice announced that "if enough frequencies are available, all applicants in a processing group *may* receive a grant" (emphasis added). If enough frequencies are not available, applications in a group will be placed in a lottery. In the course of processing, 900 MHz applications remain pending until the staff determines whether they are mutually exclusive, *see* para. 9, *supra*. For applicants who are not awarded a frequency because not enough are available, the MSD examines their proposed site location to determine if there is any 900 MHz frequency available at their proposed site location. If there is no frequency available, the application is returned.

V. CONCLUSION

14. On the basis of the foregoing, we affirm the MSD denial of Satellite Paging's request to be included in Lottery No. PMS-31. Therefore, we deny Satellite Paging's request to rescind Lottery No. PMS-31.

VI. ORDERING PARAGRAPHS

15. Accordingly, the Petition for Reconsideration filed by O. R. Estman d/b/a Satellite Paging, Inc. on September 22, 1989 of the Order of the Mobile Services Division, *O.R. Estman d/b/a Satellite Paging*, 4 FCC Rcd 6827 (Mob. Serv. Div. 1989), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Mtel Paging is the successor-in-interest to Com/Nav Marine, Inc.

[2] Satellite Paging also filed on October 23, 1989, separate Petitions for Reconsideration of grants of authorizations by the MSD to MTEL Paging, Tri-State, Page America and Contact. These petitions requested that the Bureau either return the four applications to pending status or condition those grants upon the resolution of Satellite Paging's instant Petition for Reconsideration. The action here on the instant petition renders moot the issues raised in the four Petitions for Reconsideration filed October 23, 1989.

[3] The APA states in pertinent part that "[e]ach agency shall ... separately state and currently publish in the Federal Register ... statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available ...." 5 U.S.C. § 552 (a)(1)(B).

[4] Satellite Paging contends that mere references to the frequency band in the public notices along with inadequate record-keeping of Forms 489 (Notification of Status of Facilities Under Part 22 of the Rules) result in a lack of information that does not comply with the APA requirement to be ". . . precise, timely and informative with respect to procedures," citing *United States v. Anaconda Co.*, 445 F. Supp. 486 (1977).

[5] Mtel Paging filed a joint opposition to both Satellite Paging's Petition for Reconsideration and a Petition for Reconsideration of Lottery No. PMS-31, filed by Enhanced. *See* para. 2, *supra*. Satellite Paging filed a Motion to Strike the Mtel Paging opposition, alleging that Mtel Paging cannot be considered a party to Satellite Paging's action contesting the MSD's denial of Satellite Paging's request for inclusion in the lottery. We deny Satellite Paging's Motion to Strike. Obviously, Satellite Paging's request that Lottery No. PMS-31 be rescinded has a direct impact on Mtel, and, therefore, Mtel has standing to oppose Satellite Paging's Petition. To the extent that Mtel's opposition relates to Enhanced's petition, it is resolved in a companion order, *Order on Reconsideration of Public Mobile Services Lottery No. PMS - 31*, DA 90-1764 (Com. Car. Bur. released Dec., 1990) (*PMS Lottery No. PMS - 31*), simultaneously being released with the instant case and in which we consider the Enhanced petition.

[6] Section 22.31 (c) states:

> Whenever three or more applications are mutually exclusive, but not uniformly so, the earliest filed application establishes the date prescribed in paragraph (b)(2) [60 days] of this section, regardless of whether or not subsequently filed applications are directly mutually exclusive with the first filed application. (For example, applications A, B, and C are filed in that order. A and B are directly mutually exclusive, B and C are directly mutually exclusive. In order to be considered comparatively with B (or, where applicable, included in the random selection process), C must be filed within the "cut-off" period established by A even though C is not directly mutually exclusive with A.)

[7] At the same time, the public notice triggers the 30-day period for filing petitions to deny the application. 47 C.F.R. § 22.30 (a)(4).

[8] In addition, Satellite Paging's contention that inadequate record-keeping of the Form 489's (regarding status of facilities) interferes with its ability to determine when a 900 MHz frequency becomes available, is rejected because a frequency is not available until the Commission notifies the licensee by letter that its authorization is terminated. *See e.g., Philip Y. Hahn, Jr.*, 26 F.C.C.2d 707 (1970). Such Commission action is, of course, put on public notice as well.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-481

In the Matter of

Amendment of Part 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations — RM-6910

ORDER EXTENDING COMMENT PERIOD

Adopted: December 4, 1990; Released: December 11, 1990

By the Chief, Private Radio Bureau:

1. On October 11, 1990, the Commission adopted a *Notice of Proposed Rule Making* in the above-captioned matter. The specified deadlines for comments and reply comments are December 24, 1990 and January 8, 1991, respectively.

2. On November 29, 1990, the Special Industrial Radio Service Association, Inc. (SIRSA) filed a motion requesting an extension of the deadlines for comments and reply comments by approximately two weeks. SIRSA is concerned that the proximity of the current filing dates to the holiday season may prevent some businesses from participating due to competing commitments.

3. Extensions of time are not routinely granted, and the proximity of a filing date to a holiday is generally not a sufficient reason for an extension. *See* 47 C.F.R. § 1.46(a). *Cf.* 47 C.F.R. § 1.4(b). In this proceeding, however, the time conflicts affecting interested parties during the holiday season are particularly significant. The rules proposed in this proceeding have a potential impact on virtually every private radio licensee and, in some instances, could result in a loss of operating authority. Many of the potentially affected licensees are small businesses that, faced with other commitments, might find it difficult to participate within current deadlines. The length of the extension requested would ensure the development of a complete record in this proceeding without causing undue delay. We therefore find good cause to grant the extension requested.

4. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 0.331 of the Commission's Rules and Regulations, 47 C.F.R. § 0.331, that all interested parties will have until **January 8, 1991** to file comments and until **January 24, 1991** to file reply comments.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT INTERNATIONAL, INC. File No. I-T-C-90-180

Application for authority
to provide direct service
between the U.S. and Mexico.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 3, 1990; Released: December 11, 1990

By the Chief, International Facilities Division:

1. The captioned application, filed on September 10, 1990 by TRT International, Inc. (TRTI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to use previously authorized facilities to provide direct service between the U.S. and Mexico. The application was placed on public notice on September 19, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Mexico by TRTI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-180 IS GRANTED, and TRTI is authorized to use previously authorized facilities[1] to provide TRTI's regularly authorized services, including switched voice services, between the U.S. and Mexico.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRTI and its correspondent in Mexico, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file tariff provisions pursuant to §203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] TRTI was previously authorized to lease and operate one T-1 channel to be multiplexed into 24 voice-grade circuits for the provision of switched voice services between the U.S. and overseas points reached via Mexico. *See* 3 FCC Rcd 7160 (1988). In this application TRTI requests authority to use spare capacity in the previously authorized facilities to provide switched voice services which terminate in Mexico and the U.S.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-90-124

For Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Capacity in the Tasman-2 Digital Submarine Cable for the Provision of Authorized Services between the U.S. and Australia and New Zealand

ORDER AND AUTHORIZATION

Adopted: December 3, 1990; Released: December 11, 1990

By the Chief, Common Carrier Bureau:

1. On June 5, 1990, American Telephone and Telegraph Company (AT&T) filed an application requesting Section 214 authority to: 1) acquire and operate 870 jointly assigned minimum assignable units of ownership (MAUOs), in a digital submarine cable system,[1] the Tasman-2 Cable System (Tasman-2), between Australia and New Zealand; 2) acquire by lease such extension facilities as may be needed to extend the capacity to be acquired in Tasman-2; and 3) activate capacity in Tasman-2 and the aforementioned extension facilities for the provision of its authorized telecommunication services. This application was placed on public notice on June 13, 1990. No comments were received. We grant AT&T's application for the reasons stated below.

2. Tasman-2 will extend between landing points at the existing cable station at Sydney, Australia and a new cable station to be constructed in Auckland, New Zealand. AT&T states that the estimated total cost of Tasman-2 is $114 million. About 90 percent of the costs of Tasman-2 will be on a fixed price basis with the remaining 10 percent on a cost-incurred basis. Items such as the cable, cable laying, repeaters, terminal transmission equipment and high voltage power plant will be furnished on a fixed price basis. Items such as the route survey, owners' inspection and amounts payable for customs duties and value added taxes will be handled on a cost-incurred basis.

3. The estimated original capital costs of a half-MAUO in Tasman-2 are as follows:

Tasman - 2 Cable System Estimated Unit (Half - MAUO) Costs

Segment	U.S. $
Segment B (Total Transmission Portion)	7781
Segment A (Cable Station)	199
Segment C (Cable Station)	382
TOTAL	8362

This estimate does not include interest during construction, currently estimated by the Tasman-2 co-owners to be $330 per half-MAUO. With ownership of 870 jointly assigned MAUOs (half-MAUOs) in Tasman-2, AT&T's share of the total estimated capital cost is $7.3 million (870 x $8362), plus $.3 million in interest during construction (870 x $330).

4. The Tasman-2 C&MA was signed by the initial co-owners[2] of the system on November 25, 1988. AT&T states that it [3] and the other international carriers are scheduled to sign an amendment to the C&MA on December 6, 1990 whereby they become additional owners of Tasman-2. Tasman-2 will be divided into three segments: Segment A consists of the cable station at Sydney, Australia; Segment B consists of the whole of the submarine cable between and including the associated nominal 140 Megabits per second (Mbits/s) digital input/output ports at the Segment A and Segment C cable stations; and Segment C consists of the cable station to be constructed in Auckland, New Zealand.

5. Between Sydney, Australia and Auckland, New Zealand, Tasman-2 consists of two working optical fiber pairs. The capacity of this system is provided in eight 140 Mbits/s streams, four in each optical fiber pair, with each 140 Mbits/s stream containing 1890 MAUOs for a total capacity of 15,120 MAUOs. For voice telephone requirements, digital circuit multiplication systems (DCMS) can be applied to derive nominally 150 virtual voice paths from 30 MAUOs. Tasman Cable Company Pty Limited is the supplier of the system.

6. Of the 870 jointly assigned MAUOs AT&T will hold, 840 MAUOs will be operated with its Australian correspondent, OTC Limited, and 30 MAUOs will be operated with its New Zealand correspondent, TNI. Currently, 6789 MAUOs are planned to be assigned to Tasman-2 co-owners at the time AT&T signs the Tasman-2 C&MA. Based on its proposed acquisition of 870 half-MAUOs, AT&T's percentage interest in the cable system will be 6.4 percent.[4]

7. We find that grant of AT&T's application to acquire and operate 870 MAUOs in Tasman-2 will serve the public interest. AT&T's request is based on the service preferences and needs of users, particularly those for whom security is essential and the lowest possible interference and error rates are needed; and such capacity will be required in order to satisfy forecasted demand for digital cable facilities in 1993. Tasman-2 is a part of integrated common carrier networks designed to meet specific service requirements for additional digital cable facilities in the POR and will provide additional connectivity to the HAW-4/TPC-3, G-P-T, TPC-4, H-J-K cable systems[5] and

the recently authorized PacRimEast and PacRimWest cable systems.[6] The further expansion of this technology in the POR will enhance intermodal and intramodal competition by supplementing existing cable capacity and by interconnecting with other optical fiber submarine cable systems. Tasman-2 will also improve service quality by enhancing both path and media diversity and increasing restoration capabilities. Tasman-2 will be a critical link in digital cable restoration of either the PacRimEast or PacRimWest cable systems. The Tasman-2 cable system also provides international comity with Australia and New Zealand.

8. Accordingly, IT IS ORDERED that application File No. I-T-C-90-124 IS GRANTED, and AT&T is authorized to acquire and operate 870 half-MAUOs in the Tasman-2 cable system (840 MAUOs with OTC and 30 MAUOs with TNI) and to lease such connecting facilities as may be required to extend the capacity in the Tasman-2 cable system to points located beyond the Tasman-2 landing points in order to provide its authorized services.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] A MAUO is defined in the Tasman-2 Construction and Maintenance Agreement (C&MA) as a unit of ownership designated as the minimum, practical unit of ownership, consisting of 73,684.656 bits per second. A MAUO consists of 64,000 usuable bits per second and the additional 9,684.656 bits per second required for multiplexing purposes.

[2] The two initial co-owners of Tasman-2 are OTC Limited of Australia and TNI of New Zealand.

[3] Transpacific Communications, Incorporated, AT&T's wholly-owned subsidiary, will own portions of the cable system on behalf of AT&T.

[4] These assignments represent the notional (currently assigned) capacity in Tasman-2. The difference between the design capacity and the notional capacity is referred to as the common reserve capacity. The common reserve capacity is held collectively by the co-owners in common and undivided shares in the same proportions as their percentage interests in the cable system. The notional capacity of Tasman-2 may be increased at the request of any co-owner.

[5] With the exception of TPC-4, these cable systems are currently in service. The TPC-4 cable system is scheduled to be in service in the fourth quarter of 1992.

[6] On November 8, 1990, the Commission authorized AT&T and other international common carriers to participate in the construction and operation of the PacRimEast and PacRimWest cable systems as proposed in application file numbers I-T-C-90-072 and I-T-C-90-097 (FCC 90-378 and 90-379).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PUBLIC MOBILE SERVICES LOTTERY — Lottery No. PMS-31

For Selection of Tentative Selectees for 900 MHz Common Carrier Paging Frequencies in the Greater New York City Metropolitan Area

ORDER ON RECONSIDERATION

Adopted: December 3, 1990; Released: December 11, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On August 23, 1989, the Mobile Service Division (MSD) held Lottery No. PMS-31 among five applicants for 900 MHz paging frequencies in the New York Metropolitan area. In sending the applications to lottery, the MSD had announced that four frequencies were available. *See Lottery Notice*, Mimeo 3642 (July 17, 1989). Enhanced Telecommunications Services, Inc. (Enhanced) was the fifth ranked applicant in the lottery, and as a result, it was not awarded a frequency.[1] On September 25, 1989, Enhanced filed a Petition for Reconsideration of Lottery No. PMS-31.[2] Oppositions were filed by Mtel, Contact and Tri-State. In addition, Enhanced later filed a Supplement to its Petition for Reconsideration, which was opposed by Contact (First Supplement). [3]

2. On October 23, 1989, Lehigh Mobile Valley Telephone Company (Lehigh Valley) filed a Petition for Reconsideration of the grant of frequency 931.3375 MHz to Page America. By letter dated December 20, 1989 to counsel for both Page America and Contact, the Chief, Mobile Services Division (MSD) stated that frequency 931.3375 MHz had previously been granted to Lehigh Valley and was not available to be granted to one of the lottery participants. Therefore, the MSD set aside the grant of this frequency to Page America. As a result, with three, not four frequencies available, the MSD also set aside the grant of frequency 931.1375 MHz to Contact, the fourth ranked applicant. The MSD returned both the Page America and Contact applications to pending status. On January 22, 1990, Page America filed a Petition for Reconsideration of the MSD action and requested another "comparable frequency." On May 14, 1990, the MSD granted Lehigh Valley's October 23, 1989 Petition for Reconsideration stating that on December 20, 1989 the grant of frequency 931.3375 MHz to Page America was set aside.[4] On June 13, 1990, Page America filed a Petition for Reconsideration of the May 14th action of the MSD and Lehigh Valley filed a Motion to Dismiss and Opposition to that petition.

3. Before the MSD acted on Lehigh Valley's Petition for Reconsideration, Enhanced filed on April 25, 1990, a Second Supplement to the Petition for Reconsideration (Second Supplement), which submits *inter alia*, that the five applicants in Lottery No. PMS-31 reached a settlement and agreed to a frequency assignment plan. Enhanced submitted letters from Page America, Contact, and Tri-State expressing their agreement to the proposed plan. Enhanced also represented that Mtel does not object to the plan. Page America stated that it would withdraw its Petition for Reconsideration conditioned upon its being granted frequency 931.1375 MHz as proposed. Paul Kelly d/b/a American Teltronix (Amtel) filed an opposition to the Second Supplement.[5]

II. PETITION FOR RECONSIDERATION

A. Enhanced's Allegations

4. Enhanced contends that the Bureau erred in holding a lottery for the five applications. Enhanced argues that the finding that all five applications are mutually exclusive is contrary to Section 22.31 of the rules. Under Section 22.31(b), says Enhanced, an application is entitled to comparative consideration with another application if it is both filed within the sixty day filing window and is mutually exclusive with the other application.[6] According to Section 22.31 (a), asserts Enhanced, two applications will be considered mutually exclusive only when "the grant of one application would effectively preclude by reason of harmful electrical interference, or other practical reasons, the grant of the other application."[7] Enhanced insists that there can be no mutual exclusivity among applications when more than one frequency is available, until there are two applications remaining for the last available frequency. Only at that point, says Enhanced, does the grant of an application for the last remaining frequency preclude the the grant of the other. Enhanced contends, therefore, that the Bureau should have followed the procedure of granting applications in the order of filing until only one frequency remained available for assignment, and then disposed of the remaining applications by lottery. If the Bureau had done so, says Enhanced, it would have granted the applications filed by Page America, Mtel and Enhanced, who filed in that order. The one remaining frequency would then be awarded as the result of a lottery between Contact and Tri-State, who filed subsequently. Enhanced argues that by holding the lottery with all five applications the Bureau took the later filed applications out of place in the processing line and treated them as though they were filed on the same day as Enhanced's applications. According to Enhanced, this delayed the grant of its application.

B. Opposition

5. Tri-State and Contact assert that Enhanced had notice of the policies and procedures for the filing and processing of 900 MHZ applications.[8] Contact and Tri-State assert that the MSD decision to send the five applications to lottery was based upon duly promulgated processing procedures. Additionally, they argue that these procedures were explained in the May 24, 1984 Public Notice, Mimeo 4395 (Com. Car. Bur. released May 24, 1984). Tri-State, Mtel and Contact further assert that Enhanced's arguments that the Bureau must grant applications in the order of filing are contrary to the policies for

processing 900 MHz applications. Tri-State maintains that there is no support for "first-come, first-served" filing procedures in Part 22 of the Commission's Rules for Public Land Mobile Services (PLMS). Mtel contends that it is Bureau policy in processing applications to assemble multiple filings for a limited number of frequencies into application processing groups. Contact argues that Enhanced does not refer to the May 24, 1984 Public Notice or to Section 22.31(c) of the rules, which apply to processing of 900 MHz applications.[9] Tri-State asserts that because there were fewer frequencies available than applicants applying for them in the instant case, it is axiomatic that the grant of any one of the five applications would have "effectively" precluded grant of one of the other four applications by reason of harmful electrical interference in accordance with §22.31(a).

C. Reply

6. Enhanced maintains that the Bureau's application of the "daisy-chain" rule in the May 24, 1984 Public Notice to include all applicants in a processing group in lotteries, unjustifiably broadens the class of mutually exclusive applicants and results in additional processing and service delay. Section 22.31(c), says Enhanced, is designed to limit the geographic breadth of mutually exclusive situations. According to Enhanced, the Bureau said in *O. R. Estman, d/b/a Satellite Paging* (*Estman*), 4 FCC Rcd 6827 (Mob. Serv. Div. 1989), *recon. pending*, that *normal* cut-off procedures apply to 900 MHz paging, and the May 24, 1984 Public Notice misinterprets the applicable rules for those procedures. Enhanced asserts that *Estman*, *supra*, at para. 3, says that in the absence of mutual exclusivity, applications are granted in their order of filing.

III. SECOND SUPPLEMENT TO PETITION FOR RECONSIDERATION

A. Enhanced's Allegations

7. Enhanced's Second Supplement submits that two additional frequencies had become available at the time of the lottery,[10] and therefore the lottery was unnecessary and the frequencies should be available to the lottery applicants in this proceeding.[11]

B. Opposition

8. Amtel asserts that it is in the processing group for 900 MHz frequencies in the Philadelphia Metropolitan Area. Amtel contends that a grant of 900 MHz frequencies in the New York Metropolitan area pursuant to Enhanced's plan, which includes two additional frequencies, may deprive Amtel of an opportunity to be awarded a frequency in the Philadelphia area due to the proximity to the New York market.[12] If the two frequencies are granted to New York applicants, says Amtel, they would not be available for 900 MHz applicants for Philadelphia. Amtel says Enhanced's plan departs from Commission practice that applicants are eligible for frequencies that are available at the time they file their applications. However, the two frequencies that Enhanced contends were available at the time of Lottery No. PMS-31, did not become available until after those applicants filed their applications and, consequently, were not available, Amtel asserts.

9. Amtel argues that approval of the Enhanced plan will amount to a determination that an applicant may qualify for a frequency which was not available at the time its application was filed.[13] Amtel further argues that the Commission should not abandon its policies simply for the sake of achieving a settlement in this proceeding. If the two frequencies are made available to the New York applicants, contends Amtel, other applicants would take advantage of the Commission's processing time and delay licensing processes in the hope that additional frequencies might become available before lottery.

C. Reply

10. Enhanced, Contact, and Page America reply that Amtel does not have standing to file a petition in the New York proceedings. Enhanced also responds that Amtel's theory regarding the time when frequencies are considered available is unsubstantiated in Commission precedent and practice. Enhanced contends that Amtel's argument for limiting applicants to a pool of frequencies available as of the applicant's 60 day window would result in increasing processing burdens on Commission staff. Enhanced says that applicants will be motivated (i) to monitor continually new filings and frequencies to see if they might obtain better odds of obtaining a frequency if they dismiss the earlier filed application and (ii) to refile the applications that will then be consolidated with a later-filed processing group.

IV. DISCUSSION

A. Petition for Reconsideration.

11. We conclude that Enhanced's contentions are without merit. In establishing procedures for the assignment of frequencies for the 900 MHz band, the Commission attempted to minimize mutually exclusive situations and expedite the processing of applications. *Amendment of Part 2 & 22 of the Commissions' Rules to Allocate Spectrum in the 928 - 941 MHz Band and to Establish Other Rules, Policies and Procedures for One - Way Paging Stations in the Domestic Public Land Mobile Radio Service* (*Paging Systems - DPLMRS*), 89 F.C.C.2d 1337, 1356, 1359 (1982); *recon.* (*Part 1*), 92 F.C.C.2d 631 (1982). In *Paging Systems - DPLMRS*, 89 F.C.C.2d at 1356, the Commission established that applicants would not specify a particular frequency when applying for 900 MHz frequencies and that the staff would assign specific frequencies based upon a uniform fixed mileage criteria of 70 miles between all co-channel 900 MHz stations. *See also* 47 C.F.R. §22.501 (p)(1) and (p)(2). The Commission noted that mutually exclusive situations would arise if there were not enough frequencies available and the procedures for dealing with mutually exclusive applications prevailing at that time would be followed. *Id.* Therefore, 900 MHz applications are mutually exclusive when the proposed transmitting sites are within 70 miles of a co-channel station and there are insufficient frequencies available to satisfy pending applications.

12. Following these policies, in a May 24, 1984 Public Notice we reopened the 900 MHz frequency band,[14] and we reminded all applicants that the normal notice and cut-off procedures and the 'daisy-chain' rule of Section 22.31(c) would establish the cut-off period for multiple mutually exclusive applications. Pursuant to Section 22.31(b)(2), that period is 60 days from the public notice

listing the first application as acceptable for filing. All applications filed within the 60 day cut-off period of the first-filed application are treated as a "processing group." The Public Notice reiterated the Commission's policy that because 900 MHz applications are not filed for specific frequencies, all applications within 70 miles of each other will be considered as potentially mutually exclusive. The Public Notice also noted that if there were not enough frequencies available for all applicants in the processing group, all of those applications in the group would be considered mutually exclusive and placed in a lottery. This procedure is in accordance with the Commission policy for PLMS applicants, that all timely filed applications (within the 60 day cut-off period) are eligible to be considered for available frequencies.

13. In the instant proceeding, four additional applications were filed within the 60 day cut-off period established by the Page America application. Thus, pursuant to the above procedures, all five applications formed a "processing group." We conclude that the MSD action in considering all five applications as part of a processing group was a correct interpretation of §22.31(c) of the rules. In addition, it was also correct for the MSD to hold a lottery for all five applications in the same processing group. The lack of sufficient frequencies for all five applicants made the grant of one application preclude, by reason of electrical interference, the grant of one or more of the other applications in accordance with §22.31(a) of the rules. We disagree with Enhanced's contention that Section 22.31 requires that all applicants in a processing group have their applications granted in the order of their filing until only two applications remain for the last available frequency.[15] The approach we have used is consistent with Section 22.31(b) of the rules and is fairer to all applicants filing within the 60-day cut-off period.[16] Given that the public received notice of these procedures in 1984, we find that the petition for reconsideration must be denied.

B. Second Supplement and Proposed Settlement

14. We find that five frequencies were not available for authorization to the five applicants in the New York processing group, and conclude that Enhanced's settlement plan cannot be approved.[17] Two frequencies, 931.4625 MHz and 931.4875 MHz, which Enhanced contends were available as of the lottery, were not in fact available to the applicants. In the PLMS, applicants are eligible only for frequencies that are available as of the time they file their applications. *See* 47 C.F.R. §22.4(a)(2). *See U. S. Central, Inc.*, 5 FCC Rcd 4808 (1990). A frequency is not available until the Commission notifies a licensee that the authorization is terminated. In the case of frequencies for which an authorization has expired, although §22.44 by its very terms states that authorizations automatically terminate for failure to file a timely renewal application, the frequency is not actually available for filing until the Commission notifies a licensee that the authorization is terminated.[18] When the five applications in the New York processing group were filed, the Commission had not yet acted to make the two frequencies available. The license for 931.4875 MHz expired on July 31, 1988,[19] and the license for frequency 931.4625 MHz expired on April 30, 1989.[20] Since the Commission had not taken administrative action to terminate the licenses, the frequencies were not available at the time the applications in this processing group were filed. Therefore, the MSD could not consider the two frequencies, 931.4875 MHz and 931.4625 MHz, as available for grant to any of the five New York applicants.

15. The Public Notice announcing the lottery stated that four frequencies were available. The MSD later discovered that one of these frequencies, 931.3375 MHz, had previously been authorized to Lehigh Valley. *See* para. 2. As a result, only three frequencies were available to the processing group of New York applicants. On review of the results in Lottery No. PMS-31, the number of frequencies available and the locations proposed by the applicants, the grants to Tri-State and Mtel are affirmed. Page America will receive the remaining available frequency, 931.1375 MHz. In accordance with our procedures, *see* May 24, 1984 Public Notice, *supra*, the Contact and Enhanced applications are dismissed.

V. CONCLUSION

16. Based on the analysis above we find that because only three frequencies were available to the processing group of five 900 MHz applicants for the New York metropolitan area, their applications were mutually exclusive and properly sent to Lottery No. PMS-31. We affirm the MSD action with respect to these applications but modify the frequency assigned to Page America as indicated above. We also dismiss Contact's and Enhanced's applications.

VI. ORDERING CLAUSES

17. Accordingly, IT IS THEREFORE ORDERED That the Petition for Reconsideration and the Second Supplement to the Petition for Reconsideration, filed by Enhanced Telecommunications Services, Inc., on September 25, 1989 and on April 25, 1990, respectively, ARE DENIED.

18. IT IS FURTHER ORDERED That the Petition for Reconsideration, filed September 25, 1989 (and supplemented, January 31, 1990), by Enhanced Telecommunications Services, Inc. against the application of Tri-State Radio Company, File No. 28265-CD-P-88, IS DENIED.

19. IT IS FURTHER ORDERED That the January 22, 1990 and June 13, 1990 Petitions for Reconsideration filed by Page America ARE GRANTED to the extent indicated herein.

20. IT IS FURTHER ORDERED That Page America, Inc., File No. 25417-CD-P/L-01-88, IS GRANTED frequency 931.1375 MHz.

21. IT IS FURTHER ORDERED That the applications of Contact Communications, Inc., File Nos. 28245-CD-P/L-01-88 and 28247-CD-P/L-01-88, ARE DENIED.

22. IT IS FURTHER ORDERED That the applications of Enhanced Telecommunications Services, Inc., File Nos. 27392-CD-P/L-88, 27400-CD-P/L-88, and 27429-CD-P/L-88, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Public Notice, Mimeo 4174 (released August 24, 1989) announced the results of Lottery No. PMS-31. Public Notice, Report No. PMS-89-51-A (released September 20, 1989) listed the grants of applications of the first four ranked selectees in the order of ranking in Lottery No. PMS-31: Mtel Paging, Inc. (Mtel) (KNKK978), on frequency 931.4375 MHz (25699-CD-P/L-01-88), Mtel (KNKK978) on frequency 931.4375 MHz (25727-CD-P/L-01-88); Tri-State Radio Company (Tri-State) (KNKL830) on frequency 931.6625 MHz (28265-CD-P/L-01-88); Page America of New York, Inc. (Page America) (KNKL829) on frequency 931.3375 MHz (25417-CD-P/L-01-88); Contact Communications, Inc. (Contact) (KNKE274) on frequency 931.1375 MHz (28245-CD-P/L-01-88), Contact (KNKE274) on frequency 931.1375 MHz (28247-CD-P/L-01-88).

[2] On the same date, Enhanced also filed Petitions for Reconsideration of the grants to Tri-State and to Contact. Subsequently, on January 31, 1990, it filed a supplement to each of these two petitions. The December 20, 1989 action of the Chief, Mobile Services Division, setting aside the grants to Contact, *see* para. 2, *infra*, renders the petition against Contact moot.

[3] The First Supplement was filed February 2, 1990.

[4] *See* letter to Geoffrey Bentley, Esquire, Counsel for Lehigh Valley from Chief, Mobile Services Division (May 14, 1990).

[5] Amtel is an applicant for 900 MHz facilities in eastern Pennsylvania, including the Philadelphia market area.

[6] *See* 47 C.F.R. §22.31 (b).

[7] *See* 47 C.F.R. §22.31 (a). That rule states in part: "The Commission will consider applications to be mutually exclusive if their conflicts are such that the grant of one application would effectively preclude by reason of harmful electrical interference, or other practical reason, the grant of one or more of the other applications."

[8] Tri-State also contends that Enhanced could have sought review of the July 17, 1989 Lottery Notice and that by waiting for the outcome of the lottery, its Petition for Reconsideration is untimely filed. Enhanced replies that the July 17, 1989 Lottery Notice was an interlocutory action and pursuant to the rules, it could not seek relief until the lottery had been held. We agree with Enhanced that the Lottery Notice, like a hearing designation order, is interlocutory in nature and therefore reconsiderations of such actions are not entertained. *See* 47 C.F.R. § 1.106. Nevertheless, Enhanced was not harmed since it can raise its allegations, as it is doing, in a petition for reconsideration of the substantive Commission action granting the applications of the lottery winners.

[9] Section 22.31(c) states:

> Whenever three or more applications are mutually exclusive, but not uniformly so, the earliest filed application establishes the date prescribed in paragraph (b)(2) [60 days] of this section, regardless of whether or not subsequently filed applications are directly mutually exclusive with the first filed application. (For example, applications A, B, and C are filed in that order. A and B are directly mutually exclusive, B and C are directly mutually exclusive. In order to be considered comparatively with B (or, where applicable, included in the random selection process), C must be filed within the "cut-off" period established by A even though C is not directly mutually exclusive with A.)

[10] Enhanced submits that the licensee for frequency 931.4625 MHz failed to renew its license on April 1, 1989, and the license expired April 30, 1989. Enhanced also alleges that the licensee for frequency 931.4875 MHz failed to renew its license on July 1, 1988, and the license expired on July 31, 1988.

[11] In its First Supplement to the petition for reconsideration, Enhanced contends that frequency 931.4625 MHz became available due to the expiration of the authorization, thus, four frequencies were available for grant and its application should be granted. Because the Second Supplement subsumes the allegations of the First Supplement, our consideration of the Second Supplement disposes of all the substantive issues presented in both supplements.

[12] Applications to serve areas around Philadelphia could fall within 70 miles of proposed service areas for the New York market and, therefore, could be mutually exclusive with New York applications.

[13] The five applicants in Lottery No. PMS-31 filed their applications between May and August 1988.

[14] Following an initial nationwide filing window prescribed in *Paging Systems - DPLMRS*, 89 F.C.C.2d at 1364, the Commission stopped accepting 900 MHz applications.

[15] Enhanced's reliance on *Estman, supra*, for its contention that 900 MHz applications are granted in order of filing is erroneous. The *Estman* case held that an application filed after the 60-day cut-off period for the first filed application is not entitled to be considered in the processing group formed from the date of the first filed application. The *Estman* decision was silent regarding the issue of which applications filed within the cut-off period were eligible to participate in a lottery. Our *Order on Reconsideration, O. R. Estman d/b/a Satellite Paging*, DA 90-1765 (Com. Car. Bur. Dec., 1990) is simultaneously being released with the instant case.

[16] Contrary to Enhanced's contentions, consideration of all applications in the processing group as mutually exclusive does not delay licensing. The 'daisy-chain' rule (§22.31 (c)) and the normal cut-off procedures (60 day cut-off period) are processing tools designed to provide certainty and fairness to applicants while providing the staff with the necessary criteria to process the applications. *See generally* Mobile Phone of Texas, Inc., 5 FCC Rcd 3459 (Com. Car. Bur. 1990).

[17] Due to the nature of the 900 MHz applications process in which applicants apply for 70 mile interference area and not specific frequencies, we find that Amtel does have a tangible, direct interest in this proceeding, even though it did not apply for the New York market. Moreover, there is a causal link between the claimed injury and the challenged action. *See generally Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); *Martin - Trigona v. FCC*, 432 F. 2d 682 (D.C. Cir. 1970); *National Broadcasting, Co.*, 37 F.C.C.2d 897, 898 (1972). *See also Lawrence Brand*, 3 FCC Rcd 4082 (Dom. Fac. Div. 1988). Although Amtel filed an application for locations in the Philadelphia metropolitan area and can not be considered with the processing group of five applicants in the instant case, its application remains pending. If, after the staff's assignment of 900 MHz frequencies to the New York area there are frequencies available for a processing group of Philadelphia area applicants, Amtel may be eligible for those frequencies if it is included in that processing group.

[18] Such Commission action is, of course, put on public notice. *Compare* Philip Y. Hahn, Jr. 26 F.C.C.2d 707 (1970) (a construction permit remains in effect and is valid until there occurs an actual forfeiture, either by abandonment of the permit by the original permittee or by an adverse and valid administrative action). This policy promotes fairness to the licensee whose license is being terminated by providing it with the opportunity

to contest the termination if there are valid grounds to reinstate the construction permit or license. In addition, it is fair to the public since public notice gives everyone an opportunity to file for the frequency.

[19] Letter from the Chief, Mobile Services Division to Maureen Thompson, New York Telephone Company, January 24, 1990.

[20] Letter from the Chief, Mobile Services Division to L.D. Garvey, Radiofone, Inc., (December 6, 1989). Cancellations of the licenses for frequencies 931.4625 MHz and 931.4875 MHz appeared in Public Notices, Report No. PMS-90-11-A (released December 13, 1989) and Report No. PMS-90-18-A (released January 30, 1990), respectively.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-418

In the Matter of

Amendment of Section 73.202(b),	RM-6879
Table of Allotments,	RM-7252
FM Broadcast Stations.	
(Milan, Metter, Swainsboro	
and Wrens, Georgia[1])	

ORDERS TO SHOW CAUSE

Adopted: November 5, 1990; Released: December 3, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 7037 (1989), issued in response to a petition for rule making filed by Val-Tel, Inc. ("Val-Tel"), proposing the substitution of Channel 245C3 for Channel 244A at Wrens, Georgia, and modification of its license for Station WRDW(FM) to specify operation on the higher powered channel. Tel-Dodge Broadcasting Company, Inc., licensee of Station WMCG(FM), Milan, Georgia, filed a petition for rule making requesting the substitution of Channel 285C2 for Channel 285A at Milan, Georgia, and modification of its license to specify operation on Channel 285C2. In order to accommodate the channel substitution at Milan, Tel-Dodge also proposes the substitution of Channel 279A for Channel 285A at Metter, Georgia, and the substitution of Channel 245A for Channel 280A at Swainsboro, Georgia. Although we originally dismissed the petition for rule making as unacceptable for consideration, Tel-Dodge filed a petition for reconsideration of that action, and Tel-Dodge's request subsequently became acceptable. The substitutions at Wrens and Swainsboro are mutually exclusive. Therefore, we have treated Tel-Dodge's petition as a counterproposal in this proceeding.[2] Val-Tel filed comments reaffirming its interest in the proposal. In response to the counterproposal Val-Tel and Tel-Dodge filed reply comments. In addition, Ed Winton, licensee of Station WMLO(FM), Havana, Florida, also filed reply comments.

2. In response to the counterproposal Tel-Dodge states that the only conflict between the proposal to allot Channel 245C3 to Wrens, Georgia, is the proposed substitution of Channel 245A in lieu of Channel 280A at Swainsboro. Tel-Dodge states that this conflict can be resolved by allotting Channel 263A to Swainsboro rather than Channel 245A. This change in the proposed allotment to Swainsboro would allow both the Val-Tel and Tel-Dodge proposals to be granted. Tel-Dodge goes on to state that if the conflict cannot be resolved its proposal would best serve the public interest. Tel-Dodge states that a upgrade at Station WMCG would provide a second service to 214 people, a third service to 12,998 people, a fourth service to 31,412 people and fifth service to 16,892. Therefore, argues Tel-Dodge, its proposal would bring new service to a total of 61,516 people who are now underserved, while Val-Tel's proposal would serve only 39,717 people.

3. Tel-Dodge states its willingness to reimburse the licenses of Station WHCG(FM), Metter, Georgia, and Station WXRS(FM), Swainsboro, Georgia, for the reasonable expenses they incur in changing their operating frequencies on the new channels proposed.

4. Val-Tel filed reply comments in response to the counterproposal, stating that the short-spacing problem between Val-Tel and Tel-Dodge's proposal can be resolved if Channel 263A can be substituted for Channel 280A at Swainsboro, Georgia, at its present transmitter site. In addition, Val-Tel notes, Station WXRS would also be able to operate with 6 kW with a slight change in site. Val-Tel states that such a solution would be consistent with the public interest, and would sever the two proposals. Val-Tel goes on to state that if the Commission does not substitute Channel 263A for Channel 280A at Swainsboro, and a comparison of the two proposals is required under the allotment criteria, it is clear that Val-Tel's proposal is superior to that of Tel-Dodge. Val-Tel contends that its proposal to operate on Channel 245C3 would serve an additional 206,363 persons in the Wrens, Georgia, service area, while Tel-Dodge's proposal to operate on Channel 285C2 at Milan, Georgia, would serve only an additional 98,733 persons. Val-Tel argues that Tel-Dodge's petition is short-spaced to the reference coordinates for Channel 285C2 at Havana, Florida, and to an application to modify Station WMLO to operate on Channel 285C2 in Havana, Florida.

5. Winton filed reply comments to the counterproposal stating that Tel-Dodge's petition for reconsideration is a request to change Class A to Class A channels in Milan, Metter, and Swainsboro, Georgia. Winton states that he has no objection to these changes. However, Winton states that if Tele-Dodge is a proposing to change the allotment for Milan, Georgia, to Channel 285C2, he does object.

6. Both Val-Tel's and Winton's objections to Tel-Dodge's counterproposal are premised on short-spacings which would now appear to be moot. We find that Channel 285C2 can be allotted to Milan at coordinates North Latitude 32-09-32 and West Longitude 83-10-55. The referenced site eliminates the short-spacing to Station WMLO(FM), Channel 285C2, Havana, Florida. Winton was allotted Channel 285C2, Havana, Florida, at coordinates North Latitude 30-34-43 and West Longitude 84-15-59. *See* MM Docket 88-379, 4 FCC Rcd 5676 (1989). However, Winton now holds a construction permit for station WMLO(FM), Channel 285C2 at coordinates North Latitude 30-35-11 and West Longitude 84-14-11. These coordinates do not conflict with the allotment of Channel 285C2 at Milan. Therefore, Winton's comments will not be considered any further.

7. In order to proceed with the proposals in this proceeding, it is necessary to issue *Orders to Show Cause* to Station WXRS(FM), Channel 280A, Swainsboro, Georgia, and Station WHCG(FM), Channel 285A, Metter, Georgia, seeking comments as to why their licenses should not be modified to specify operation on Channel 263A and Channel 279A in lieu of Channel 280A and 285A, respectively. An engineering analysis confirms that Channel 245C3 can be substituted for Channel 244A at Wrens, Georgia. [3] Channel 285C2 can be substituted for Channel 285A at Milan, Georgia. Channel 279A can be substituted

for Channel 285A at Metter, Georgia, and Channel 263A can be substituted for Channel 280A at Swainsboro, Georgia, at its present transmitter site.[4]

8. We believe the public would be served by the proposed channel substitutions at Wrens and Milan, since each community would receive an expanded FM service. As requested, we shall propose to modify the licenses of Station WRDW(FM) at Wrens, Georgia, and Station WMCG(FM) at Milan, Georgia, to specify operation on Channels 245C3 and 285C2, respectively. In accordance with Section 1.420(g) of the Commission's Rules we shall not accept other expressions of interest in the proposed channels. In addition, because an opportunity has already been provided for the filing of counterproposals, we will not accept any additional counterproposals.

9. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Wm. Jimmy Page, TR/As Radio Metter, licensee of Station WHCG(FM), Channel 285A, Metter, Georgia, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 279A in lieu of Channel 285A.

10. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Lacom Communication, Inc. licensee of Station WXRS(FM), Channel 280A, Swainsboro, Georgia, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 263A in lieu of Channel 280A.

11. Pursuant to Section 1.87 of the Commission's Rules, Radio Metter and Lacom Communication, Inc. may, not later than **January 24, 1991,** file written statements showing with particularity why their licenses should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Radio Metter and Lacom Communication Inc. to furnish additional information. If licensees raise a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modifications, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Radio Metter and Lacom Communication Inc., will be deemed to have consented to the modifications as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modifications are ultimately found to be in the public interest.

12. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Wm. Jimmy Page,
TR/As Radio Metter
P.O. Box 238
Metter, Georgia 304

Lacom Communication, Inc.
P.O. Box 1590
Swainsboro, Georgia 30401

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606(b) of the Commission's Rules,*46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte*presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Milan, Metter and Swainsboro, Georgia, have been added to the caption.

[2] Public Notice of the counterproposal was given on February 6, 1990, Report No. 1807.

[3] The coordinates for Channel 245C3 at Wrens are North Latitude 33-13-20 and West Longitude 82-17-50.

[4] The coordinates for Channel 285C2 at Milan are North Latitude 32-09-32 and West Longitude 83-10-55. The coordinates for Channel 279A at Metter are North Latitude 32-23-56 and West Longitude 82-02-16. The coordinates for Channel 263A at Swainsboro are North Latitude 32-34-52 and West Longitude 82-23-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

tvUSA/Pueblo, Ltd. File No. BAPCT-880226KH
(Assignor)

and

Sangre De Cristo Communications, Inc.
(Assignee)

For Assignment of Construction
Permit for Television Station
KPCS, Channel 32, Pueblo,
Colorado

Sangre De Cristo File No. BMPCT-880705KF
Communications, Inc.

For Minor Modification of
Construction Permit for
Television Station KPCS,
Channel 32, Pueblo, Colorado

MEMORANDUM OPINION AND ORDER

Adopted: October 25, 1990; Released: December 5, 1990

By the Commission:

1. The Commission has before it for consideration: (a) an application for review of the Mass Media Bureau's decision in *tvUSA/Pueblo, Ltd.*, 4 F.C.C. Rcd. 598 (1989) *(Bureau Decision)*, filed by Sangre de Cristo Communications, Inc. (Sangre); (b) an opposition filed by Pikes Peak Broadcasting Company, licensee of television station KRDO-TV (ABC, Channel 13), Colorado Springs, Colorado (Pikes Peak); and (c) related pleadings.

BACKGROUND

2. In its decision, the Bureau denied the subject application to assign the construction permit for unbuilt television station KPCS, Channel 32, Pueblo, Colorado, from tvUSA/Pueblo, Ltd. to Sangre. Sangre is the licensee of KOAA-TV (NBC, Channel 5), Pueblo, Colorado and K30AA, a UHF television translator, Colorado Springs. The Bureau also denied the subject application for minor modification of the KPCS construction permit. As stated in the *Bureau Decision*, the proposed acquisition of KPCS will result in the Grade B contour of that station being completely encompassed by the Grade B contour of Sangre's television station, KOAA-TV, Pueblo, Colorado. See 4 F.C.C. Rcd. at 598. Because Section 73.3555(a)(3) of the Commission's Rules prohibits any overlap of the Grade B contours of commonly owned stations, this acquisition would ordinarily be barred. Sangre, however, requested grant of the application, pursuant to Note 5 of the rule, which provides an exception to the contour overlap or "duopoly" rule for stations that are classified as satellites. This exception is granted when the Commission determines, on a case-by-case basis, that common ownership, operation or control of the stations in question would be in the public interest.

3. After reviewing the entire record before it, the Bureau determined that the proposed acquisition would not be in the public interest because of the following: (1) the Grade B contour of KPCS would be totally encompassed by that of KOAA-TV in Pueblo; (2) Sangre failed to demonstrate the number of television households or actual viewers who would receive improved or first-time NBC service if the satellite exception was approved; (3) although Sangre claimed to be at a competitive disadvantage due to mountainous terrain when compared to the other network affiliates in the market, Sangre did not deny that its competitors are subject to shadowing as a result of the mountainous terrain; (4) Sangre's request would result in the common ownership of two separate, full-service television stations in the same community; (5) Sangre's primary service obligation was to Pueblo, not Colorado Springs; and (6) there were alternative means of providing extended service to Colorado Springs through the use of boosters and translators.

4. In its application for review, Sangre essentially argues that the Bureau failed to take cognizance of KOAA-TV's service obligations to its entire service area and the inability of the market to support another full-service station. Further, Sangre argues that Commission precedent, upon which the Bureau relied, was inapposite and the use of boosters and translators was not an adequate alternative means of extending KOAA-TV's service. Sangre also submitted several new facts to support its satellite proposal. A new engineering statement notes that: (1) Sangre's operation of KPCS(TV) as a satellite station would facilitate new NBC service to 49,006 viewers or 18% of the Colorado Springs population; and (2) a TV booster operation would cause objectionable interference to additional areas now receiving satisfactory off-air service.

DISCUSSION

5. As noted in the *Bureau Decision*, the goals of our multiple ownership rules are to promote economic competition and diversity of programming viewpoints. Bureau Decision, 4 F.C.C. Rcd. at 600. *See e.g., Multiple Ownership of Standard, FM and Television Stations*, 45 F.C.C. 1476, 1476-77, *reconsideration denied*, 45 F.C.C. 1728 (1964) *(Multiple Ownership Rule)*. The contour overlap or "duopoly" rule serves those goals by insuring that commonly owned stations do not serve significant areas in common. What constitutes a sufficient good cause showing for authorization of a satellite operation has been established by case law and involves a balance of various factors. *See Further Notice of Proposed Rulemaking in* MM Docket No. 87-8, FCC 90-279 (released September 18, 1990). Generally, the greater the degree of overlap, the greater the adverse effect on the policies underlying the multiple ownership rule. Further, the greater the overlap, the "less efficient use of the spectrum is involved [because] the same programming is received from two sources in the overlap area . . . ." *Television Satellite Stations*, 2 F.C.C. Rcd. 1359, 1362 (1987). The *Bureau Decision* was based on a number of factors, not the least of which was the fact that the Grade B contour of KPCS

would be totally encompassed by that of KOAA-TV in Pueblo. We have reviewed the *Bureau Decision* and we agree with the Bureau's conclusions. With the foregoing in mind, we will address Sangre's new arguments below.

6. First, we find that the Bureau did not ignore KOAA-TV's service obligations beyond Pueblo, as suggested by Sangre. The Bureau merely stated that the station's obligation to serve areas beyond its city of license, such as Colorado Springs, was secondary. *Bureau Decision*, 4 F.C.C. Rcd. at 600. In this regard, we are also unpersuaded by Sangre's new documentation that a specific number of people within Colorado Springs do not currently receive NBC service and would be benefitted by a grant of Sangre's satellite proposal. Like its earlier submission to the Bureau, Sangre has merely stated the number of persons in the shadowed areas, without indicating the extent to which these persons are not receiving NBC service.

7. Next, we find that the Bureau, in evaluating Sangre's satellite proposal, correctly relied on the rationale of the Commission in *Coral Television Corp.*, 80 F.C.C.2d 323 (1980), *reconsideration denied*, 84 F.C.C.2d 438 (1981). If approved, the KPCS satellite operation would result in the Grade B contour of that station being totally encompassed by the Grade B contour of Sangre's television station, KOAA-TV, Pueblo, Colorado. Thus, the satellite proposal would deprive the area of the potential for an increase in the number of separate voices in the market, as in *Coral*. Given the contour overlap here, we believe that any other factual distinctions between *Coral* and this case, related to terrain, channel space availability and the presence of a competing applicant for a construction permit to operate a full-service station, are not distinctions which render *Coral* inapposite.

8. Finally, we find unpersuasive Sangre's argument that neither television translators nor on-channel boosters can provide alternative means for Sangre to improve service to Colorado Springs. Sangre's new engineering statement notes that a TV booster operation could cause objectionable interference to the primary station's off-air service. However, if the shadowing here is as great as Sangre alleges, the likelihood that boosters will be effective is correspondingly greater. Further, a showing that translaters or boosters are not as desirable as a single full-service station, is not alone a basis for granting a satellite exception to our multiple ownership rule. In any event, given the degree of overlap and the presence of other considerations in this case, we do not find Sangre's contentions adequate to justify the requested satellite operation.

9. Based on the foregoing, even assuming an adequate economic justification for satellite operation had been made, we find that Sangre has failed to demonstrate that the Bureau erred in denying its assignment application pursuant to the satellite exception in Note 5 of Section 73.3555 of the Commission's Rules. Accordingly, IT IS ORDERED, That the action of the Mass Media Bureau, denying Sangre's acquisition of KPCS-TV and requested exception to the multiple ownership rules, IS AFFIRMED, and Sangre's application for review IS DENIED.

10. IT IS FURTHER ORDERED, That the Mass Media Bureau shall mail copies of this decision to the parties to this proceeding by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell Transmittal No. 1495
Tariff F.C.C. No. 128

ORDER

Adopted: November 28, 1990; Released: November 29, 1990

By the Chief, Common Carrier Bureau:

1. Pacific Bell (Pacific) filed Transmittal No. 1495 on August 30, 1990, and has a scheduled effective date of November 30, 1990. The transmittal revises Pacific's Tariff F.C.C. No. 128 to establish two new Digital Data Service (DDS) speeds of 19.2 and 64 Kbps. These new speeds, however, would be available only with High Capacity DS1 to Voice/Digital Multiplexing; they would not be available for DS1 to DS0 multiplexing at 10 DDS hubs. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 1495 on September 14, 1990; Pacific replied on September 21, 1990.

2. MCI contends that despite Pacific's claim that the services are proposed to meet customer needs, Pacific has constrained their availability for some "unexplained reason." MCI Petition at 1-2. MCI notes that although the service is offered in conjunction with "High Capacity Multiplexing, DS1 to Voice/Digital, Option 2," Pacific does not propose to make the services available with DS1 to DS0 DDS central office multiplexing. *Id.* at 2. MCI concludes that the proposed offering of the two new speeds is restricted in a way that may unreasonably discriminate and disadvantage customers who want 19.2 and 64 Kbps service combined with DS1 to DS0 DDS multiplexing. *Id.* It suggests that for this reason Transmittal 1495 may violate Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§201(b), 202(a). *Id.*

3. Pacific replies that MCI offers no reason to suspend and investigate the proposed tariff. Pacific Reply at 1. Pacific states that MCI merely charges that Transmittal 1495 does not adequately explain why the new service is unavailable with DS1 to DS0 DDS central office multiplexing. *Id.* Pacific notes that DDS service is currently available in four speeds at several hundred central offices. *Id.* Pacific states that equipment limitations preclude availability of the new speeds at 10 locations which are equipped for DS1 to DS0 multiplexing. Pacific believes, however, that the availability of the two new speeds at the several hundred other locations using DS1 to Voice/Digital multiplexing will increase the flexibility of DDS service, allowing customers to reduce their channel mileage charges. *Id.* at 2.

4. On November 2, 1990, Pacific replied, in response to the Bureau's inquiry, that outmoded test equipment precludes digital testing for the new DDS speeds at its 10 DS1 to DS0 equipped hubs. In addition, these hubs are not capable of performing digital multiplexing of services offered at the 64 Kbps speed. Pacific Clarification Letter, November 2, 1990. Pacific states that as new technology is deployed, these DS1 to DS0 hubs will incorporate DS1 to Voice/Digital functionality. *Id.* Because the technology is in transition, however, Pacific has no present plans to equip the 10 existing hubs utilizing current technology with new test equipment. *Id.*

5. The Common Carrier Bureau has reviewed Pacific's Transmittal 1495 and the associated pleadings. We conclude that Pacific's tariff revision presents no question that warrants suspension or investigation at this time.

6. Accordingly, IT IS ORDERED that the petition to suspend and investigate Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1495, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 28, 1990

PROCEDURES FOR FILING ERRATA TO SUPPORT INFORMATION FOR ANNUAL 1991 ACCESS TARIFFS

In an Order, *Commission Requirements for Cost Support Material To Be Filed with January 1, 1991 Access Tariff Revisions*, DA 90-1499, released October 24, 1990, (*TRP Order*), the Common Carrier Bureau addressed procedures for the filing of errata by local exchange carriers (LECs) to correct any inaccurate support data accompanying the 1991 access tariff revisions to be made on November 1, 1990. The Bureau noted that the filing of flawed supporting information and the subsequent submission of errata seriously detract from the ability of the Commission and interested parties to evaluate the reasonableness of proposed rates within the notice period. The *TRP Order* therefore adopted procedures, similar to those employed in the review of past access tariff filings, to address this problem, including the requirement that carriers request special permission to submit corrected data without impairing the scheduled effective date of the annual filing.

If corrections are filed in a timely manner, carriers should expect to be granted special permission to correct on short notice substantive, clerical, transcription, or other minor errors, and to supply any data omitted in their November 1, 1990, filings, unless unusual circumstances require other treatment. This erratum procedure is essential to completion of the Commission's review of the annual access tariffs by January 1, 1991, since even a minor error or omission may impede the Commission's performance of its duties under the Communications Act. It is also important that corrections be placed in the public record so that interested members of the public will have an opportunity to review and analyze the revised data.

Any application for special permission proposing errata relating to the 1991 access tariff revisions should include a request that the November 1, 1990, transmittal take effect on the originally scheduled effective date of January 1, 1991. This includes errata filed to correct tariff errors or to revise tariff support materials. We emphasize that carriers filing annual access tariffs are under a legal obligation to correct any erroneous data discovered in the Tariff Review Plan or other support materials in a timely fashion. Carriers should also recognize that any delay in correcting erroneous data increases the possibility that their filings will be treated as new transmittals with effective dates later than January 1, or be subject to other appropriate action.

The following guidelines detail the procedures that carriers should follow in submitting errata.

FORM OF FILING

The application for special permission to file errata should state that it concerns a proposed amendment to the carrier's annual access filing, identifying the transmittal number and other pertinent information. After grant of the application, if the errata filing does not affect rates, the carrier should file an amended transmittal using the transmittal number of the November 1, 1990, filing. No new filing fee is required to make this amended transmittal filing. If the errata filing includes any rate changes, a new transmittal number should be assigned and used and a new filing fee will be due.

Materials accompanying the application letter should include corrected pages, properly numbered and clearly labeled to indicate their location in the original filing. If the corrections include changes to information on computer disks, then new replacement disks should be submitted with the errata application rather than with the subsequent tariff filing. The new disks should be clearly labeled to show the date of the re-submission and other identifying information. The errata submissions should be filed in the same manner as the corresponding material in the November 1, 1990, filing.

In most cases the Tariff Division expects to issue a special permission number for the errata filing, and a letter granting the request will be prepared and sent to the carrier.

FILING DATES

Carriers are directed to file errata correcting errors and omissions in their annual access tariffs and support materials as these errors and omissions are discovered. However, in order to make this process more manageable, we require that applications for special permission to file errata be filed insofar as possible in a single filing, and that they be filed only on or before Friday, November 30, 1990. We emphasize that November 30, 1990, is the cutoff date for such errata. Although carriers remain obligated to correct filed data at any time they identify errors, they should not assume that special permission will be granted with respect to filings at a later date. Copies of applications for special permission and related materials should be distributed in the same manner as required for the November 1, 1990, filing. In this regard, carriers are reminded to serve the Commission's copy contractor, International Transcription Service.

For further information, contact Allen A. Barna at (202) 632-6917 or Daniel Grosh at (202) 632-6387.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 5, 1990

ANNOUNCEMENT OF EIGHTY-SEVENTH INTELSAT BOARD OF GOVERNORS' MEETING

The Board of Governors of INTELSAT will hold its 87th meeting December 12th through 18th, 1990. Comsat, as U.S. Signatory to INTELSAT, will represent the United States at this meeting. Consistent with the Commission's directives and criteria in its initial Order in CC Docket No. 80-634 (*Comsat Structure Order)* concerning the public dissemination of INTELSAT-related documents and information, the agenda of BG-87 and certain related documents will be available for public inspection in Room 533, 1919 M St., Washington, D.C., on a daily basis as these documents are received by the Commission.

The public is invited to comment in writing on the issues that will be addressed at this INTELSAT meeting prior to the issuance of government instructions to Comsat. Comments will be reviewed and considered to the extent that time allows and may, if deemed appropriate, be incorporated into specific instructions. Because of the typically short periods of time between government receipt of the agenda and related documents and the time that instructions must be formulated, we urge parties wishing to comment to do so in a concise manner and as early as possible.

Parties should submit their comments as follows. The original and three copies should be sent to the Office of Assistant Bureau Chief/International, Common Carrier Bureau, Room 534, Federal Communications Commission, Washington, D.C. 20554, for inclusion in the public file in the Common Carrier Bureau International Reference Room. (Because of the informal nature of this mechanism, parties need not file copies with the Secretary of the FCC.) In addition, copies are to be forwarded to the Office of International Affairs, National Telecommunications and Information Administration, Room 4701, 14th and Pennsylvania Avenue, N.W., Washington, D.C. 20230 and to Bureau of International Communications and Information Policy, U.S. Department of State, CIP, Washington, D.C. 20520. Comments should be labeled as File No. BG-87.

For further information contact Joel Pearlman at (202) 632-3214.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New England Telephone and Telegraph Company Tariff F.C.C. No. 40	Transmittal Nos. 1100 and 1104
New York Telephone Company Tariff F.C.C. No. 41	Transmittal No. 1095

ORDER

Adopted: November 30, 1990; Released: November 30, 1990

By the Chief, Common Carrier Bureau:

1. On November 2, 1990, New England Telephone and Telegraph Company (NET) filed Transmittal No. 1100 and New York Telephone Company (NYT) (together, NYNEX) filed Transmittal No. 1095 to implement one of the provisions of a Consent Decree entered into between NYNEX and the Commission regarding alleged overcharges by the carrier stemming from its dealings with NYNEX Material Enterprises Company (MECO).[1] Under the terms of the Consent Decree, NYNEX agreed to make a one-time reduction to interstate revenue requirements in the amount of $35.5 million. These tariffs will reduce NET and NYT interstate access rates -- Switched Access and Carrier Common Line recurring rates, and Multiline Business End User charges[2] -- from December 1, 1990, through December 31, 1990, by $15.3 million and $20.2 million, respectively. The rate adjustment factors used by NET and NYT in developing the rate reductions for December 1990, were calculated based on the demand and revenue requirement forecasts underlying their 1990 Annual Access Tariff filings. NET Transmittal 1100, Description and Justification at 2; NYT Transmittal 1095, Description and Justification at 2.

2. On November 9, 1990, MCI Telecommunications Corporation (MCI) filed identical petitions to suspend and investigate against both transmittals. While MCI states that the approach used in developing the rate adjustment factors "appears mathematically correct," it is concerned that the proposed refund is a product of NET and NYT demand forecasts. MCI argues that because the forecasts may be incorrect, NYNEX may not refund the entire $35.5 million. MCI therefore requests that the Commission suspend the NYT and NET tariffs for one day and impose an accounting order to make certain that the full $35.5 million is actually refunded. MCI Petition, NET Transmittal 1100 at 2-3; MCI Petition, NYT Transmittal 1095 at 2-3.

3. In its reply, filed November 19, 1990, NYNEX asserts that it has fully complied with the terms of the Consent Decree and presents three arguments why the MCI petitions should be denied. First, since MCI does not dispute the validity of the NET and NYT demand forecasts, NYNEX argues that MCI has not raised any issues warranting investigation. NYNEX Reply at 2. Second, NYNEX believes that the petitions complain about the mechanism established to implement the rate reduction and thus should be treated as requests for reconsideration of the *Consent Decree Order* and dismissed as untimely. *Id.* at 3.

4. Finally, NYNEX contends that the Commission does not have the authority under Section 204(a)(1) of the Communications Act, as amended, 47 U.S.C. § 204(a)(1), to impose an accounting order in this case since this is a proposed rate decrease. *Id.* at 3-4. NYNEX states, however, that it plans to submit data to the Commission at a later date to demonstrate the amount of money refunded to customers pursuant to Transmittals 1100 and 1095. *Id.* at 3 n.3.

5. The Common Carrier Bureau has reviewed New England Telephone and Telegraph Company Transmittal No. 1100, New York Telephone Company Transmittal No. 1095, MCI's petitions, and NYNEX's reply. We conclude that an investigation is not warranted at this time. We do conclude, however, that it would be advisable for NYNEX to report to the Commission regarding amounts refunded to customers in order to ensure compliance with the *Consent Decree Order*. We therefore will require NYNEX to submit a report to the Commission to disclose the total amounts refunded to customers as a result of actual demand for the rate elements it is reducing, and to propose any additional refund mechanism which may be necessary pursuant to the *Consent Decree Order*.

6. Accordingly, IT IS ORDERED that the petitions to suspend and investigate filed by MCI Telecommunications Corporation against New England Telephone and Telegraph Company Tariff F.C.C. No. 40, Transmittal No. 1100, and New York Telephone Company Tariff F.C.C. No. 41, Transmittal No. 1095, ARE DENIED.

7. IT IS FURTHER ORDERED that the NYNEX Telephone Companies SHALL FILE a report with the Secretary of the Commission on February 1, 1991. The report (1) shall contain a detailed accounting of actual amounts refunded pursuant to New England Telephone and Telegraph Company Tariff F.C.C. No. 40, Transmittal Nos. 1100 and 1104, and New York Telephone Company Tariff F.C.C. No. 41, Transmittal No. 1095; (2) shall identify separately the specific amounts actually refunded, based on historical demand, for Switched Access and Carrier Common Line recurring rates, for Multiline Business End User charges, and for Single Line Business and Residential End User charges; and (3) shall propose any additional refund mechanisms which may be necessary to achieve compliance with the requirements of the *Consent Decree Order*. The NYNEX Telephone Companies also shall file copies of the report with the Chief, Tariff Division, Common Carrier Bureau, and with the Commission's contractor for public records duplication, International Transcription Service, 2100 M Street, N.W., Washington, D.C. 20037, (202) 857-3800. A copy of the report will be available for inspection during regular business hours at the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] In the Matter of New York Telephone Co., New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, 5 FCC Rcd 5892 (1990), *recon. pending* (*Consent Decree Order*).

[2] On November 29, 1990, NET was granted special permission to file Transmittal No. 1104 (Special Permission No. 90-1252). Transmittal 1104, filed November 30, 1990, revises Transmittal 1100 to include residential subscriber line charges in Massachusetts in the reduction to revenue requirements for NET under the Consent Decree.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 4, 1990

COMMISSION ESTABLISHES PROCEDURES FOR FILING OF INFORMATIONAL TARIFFS BY OPERATOR SERVICE PROVIDERS

The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) requires operator service providers (OSPs) to file informational tariffs not later than January 15, 1991. This Public Notice establishes filing procedures for the informational tariff filing required by TOCSIA.

Who Must File: Each provider of operator services is required to file an informational tariff. TOCSIA defines "provider of operator services" as "any common carrier that provides operator services or any other person determined by the Commission to be providing operator services." 47 U.S.C. § 226(a)(9). TOCSIA defines "operator services" as

> any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than (A) automatic completion with billing to the telephone from which the call originated; or (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

47 U.S.C. § 226(a)(7). The Commission expects that all persons encompassed by these definitions will file informational tariffs as required by TOCSIA.

Content of Filing: Each informational tariff filed by an OSP should clearly state the carrier's name and business address and the effective date on each page of the informational tariff. In addition, each informational tariff should specify rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(A). Informational tariffs should conform to the format attached to this Public Notice.

Informational tariffs should comply with the provisions of Sections 61.54 and 61.74 of the Commission's Rules. Charges should be stated in dollars and cents and should not include cross-references to any other document, except that informational tariffs may cross-reference other documents containing rate center vertical and horizontal coordinate information for purposes of determining mileage.

TOCSIA does not require a public notice period before provisions of informational tariffs become effective. Therefore, Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, shall not apply to these filings.

Filing Procedures: Informational tariffs should be filed pursuant to the provisions of Section 61.32 of the Commission's Rules, 47 C.F.R. § 61.32. These tariffs need not be accompanied by a formal Transmittal letter but should be accompanied by a cover letter explaining the purpose of the filing. In brief, Section 61.32 provides that the original of the carrier's letter should be addressed to the Secretary of the Commission and should be submitted, without attachments, along with FCC Form 155, and the appropriate fee to the Mellon Bank, Pittsburgh, Pennsylvania. A copy of the cover letter and the attachments should be submitted to the Secretary's Office, the Commission's contractor for public records duplication, International Transcription Service, and the Chief, Tariff Review Branch.

Any changes to the tariff should be submitted under a new cover letter with a *complete* copy of the tariff, including changes. The changes should be explained in the cover letter and need not be symbolized on the tariff pages. These documents should then be filed pursuant to the procedures stated above.

For further information contact Judy Nitsche at (202) 632-5550 or Kelly Cameron at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Company Tariff F.C.C. No. 1 — Transmittal No. 386

ORDER

Adopted: December 3, 1990; Released: December 4, 1990

By the Chief, Common Carrier Bureau:

1. In Transmittal No. 386, the Bell Atlantic Telephone Companies (Bell Atlantic) seek to add two new optional features to their Public Data Network (PDN) offering -- the Network User Interface (NUI) feature and the Network Management Reports (NMR) feature. Bell Atlantic also proposes to restructure the existing PDN Transaction Service option to include volume discounts. On September 21, 1990, MCI filed a petition to suspend and investigate Transmittal 386; Bell Atlantic filed a reply on October 3, 1990. Transmittal 386 is scheduled to become effective December 5, 1990.

2. The NUI is a billing feature which would provide six-digit access codes allowing Bell Atlantic to identify and directly bill specific dial-up end user customers for PDN minutes of use, network connection charges, and kilopacket usage, instead of billing the underlying information providers. Tr. 386, Section 16.1.1; Description and Justification (D&J) at Section 1.1.1. The NMR feature would provide customers with a detailed, monthly call record of PDN usage on a per call basis instead of the current single bill for each local access and transport area (LATA) which reports total call volumes. Tr. 386, Section 16.1.1; D&J at Section 1.1.2.

3. Transaction Service, an existing PDN option designed for short duration communications such as on-line credit verification, was introduced by Bell Atlantic in July 1988. D&J at Section 1.1.3. Bell Atlantic proposes to restructure the rates for this option to include a volume discount by replacing the existing flat rate of two cents per transaction with a tapered rate structure. *Id.* According to Bell Atlantic, this discount is necessary for Transaction Service to achieve market acceptance.

4. MCI contends that Bell Atlantic's cost support for the new PDN feature is not sufficient to determine if Bell Atlantic has correctly allocated its investment between regulated and nonregulated activities. MCI Petition at 2. Specifically, MCI asserts that Bell Atlantic used an unknown and unexplained allocator, called "switched segments," to determine regulated investment in PDN and withheld the percentage of investment assigned to regulated activities. Thus, says MCI, it is impossible to determine if the proposed features are priced correctly. MCI also argues that the allocator used to assign costs to the regulated rate base is not consistent with the 20 percent allocator, based in part on Dial Equipment Minutes (DEM) data, used to determine the amount of interstate costs to be recovered for NUI and NMR. *Id.* Finally, MCI charges that the proposed rates for PDN Transaction Service are priced far above fully distributed costs and that the pricing raises questions of strategic pricing and abuse of monopoly power. *Id.* at 3-5.

5. Bell Atlantic responds that the 20 percent allocation factor used to separate intrastate and interstate costs is not consistent with the allocation factor used to divide regulated and unregulated costs reported in its FCC Reports 495A and 495B because the two factors serve "entirely different purposes and have absolutely nothing to do with each other." Bell Atlantic Reply at 2. Bell Atlantic also notes that the switched segments allocator is defined in Section 7 of its Cost Allocation Manual (CAM). *Id.* at 2 n.5. With regard to its use of the 20 percent allocator to separate interstate and intrastate costs, Bell Atlantic states that Part 36 of the Commission's Rules requires use of a DEM-based allocator for jurisdictional separation of regulated local switching investment, and therefore its DEM-based allocator fully complies with the Commission's rules. *Id.* at 3-4. Finally, Bell Atlantic disputes MCI's claim that Bell Atlantic's Transaction Service is strategically priced and reflective of a monopoly. *Id.* at 6.

6. The Common Carrier Bureau has reviewed Bell Atlantic Telephone Companies Transmittal No. 386, MCI's petition, and related pleadings. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petition to suspend and investigate Bell Atlantic Telephone Company Tariff F.C.C. No. 1, Transmittal No. 386, filed by MCI Communications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-216

In re Applications of

MARLIN BROADCASTING OF CENTRAL FLORIDA, INC.	File No. BPCT-850319KF
SUNSHINE TELEVISION 27, INC.	File No. BPCT-850320KN
REECE ASSOCIATES, LIMITED	File No. BPCT-850320KR
MAGIC CITY BROADCASTING, INC.	File No. BPCT-850320KU
ORLANDO 27, INC.	File No. BPCT-850320KX
HIGHLAND COMMUNICATIONS, LTD.	File No. BPCT-850320LA
CENTRAL FLORIDA TELEVISION, LTD.	File No. BPCT-850320LD
FLORIDA TELEVISION COMPANY	File No. BPCT-850320LM

For Construction Permit for
A New Television Station
Orlando, Florida

ORDER

Adopted: December 3, 1990; Released: December 12, 1990

By the Commission:

1. Now before the Commission are: (a) an application for review, filed February 21, 1990, by Highland Communications, Ltd.; (b) a petition for reconsideration, filed October 29, 1990, by Highland Communications, Ltd.; and (c) an opposition, filed November 13, 1990, by Reece Associates, Limited.

2. In an Order, released on October 4, 1990, the Commission affirmed with minor modifications a Review Board decision, 4 FCC Rcd 7945 (Rev. Bd. 1989), granting Reece Associates' application on comparative grounds. *Marlin Broadcasting of Central Florida*, 5 FCC Rcd 5751 (1990). Highland seeks reconsideration of that Order based solely on the Commission's failure to recite the filing of, or to dispose of, its February 21, 1990 application for review.

3. As Highland alleges, the Commission recited in its October 4, 1990 Order that all *eight* applicants sought Commission review of the Board's decision, but it listed, and ultimately denied, only the *seven* applications for review filed by Marlin Broadcasting of Central Florida, Inc., Orlando 27, Inc., Reece Associates Limited, Magic City Broadcasting, Inc., Sunshine Television 27, Inc., Central Florida Television, Ltd., and Florida Television Company. The failure to include in that list the application for review, filed February 21, 1990, by Highland was inadvertent. In this regard, the Commission, having considered the comparative qualifications of all eight applicants seeking review of the Board's decision, explicitly affirmed the Board's selection of Reece as the superior applicant under the standard comparative issue. 5 FCC Rcd at 5751 ¶ 2. Thus, we will now deny Highland's application for review and dismiss as moot its petition for reconsideration.

4. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 U.S.C. § 155(c)(5) and 47 C.F.R. § 1.115(g), the application for review, filed February 21, 1990, by Highland Communications, Inc. IS DENIED; and that the petition for reconsideration, filed October 29, 1990, by Highland Communications, Inc. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-520

In re Applications of

Charlotte Hutchison TR/as Hutchison Broadcasting Company (hereafter "Hutchison")	File No. BPH-880823MB
Frazier Broadcasting Company (hereafter "Frazier")	File No. BPH-880823MC
Knoxville FM, Inc. (hereafter "Knoxville FM")	File No. BPH-880824MA
Knox County Broadcasters, Inc. (hereafter "Knox County")	File No. BPH-880824MO
McDonald Communications, Inc. (hereafter "McDonald")	File No. BPH-880824MP
Glen Allen Powers (hereafter "Powers")	File No. BPH-880824MT
Reeves Communications Corporation (hereafter "Reeves")	File No. BPH-880824MV
Spacecom, Inc. (hereafter "Spacecom")	File No. BPH-880825MD
CAB Communications Limited Partnership (hereafter "CAB")	File No. BPH-880825MP
TLD Communications, Inc. (hereafter "TLD")	File No. BPH-880825NC
Barden Radio, Inc. (hereafter "Barden")	File No. BPH-880825NM
Thomas M. Eells (hereafter "Eells")	File No. BPH-880825NP
The Scott Media Group Limited Partnership (hereafter "Scott Media")	File No. BPH-880825NQ
Kerman Radio Corporation (hereafter "Kerman")	File No. BPH-880825OE
Frederick C. Jacob (hereafter "Jacob")	File No. BPH-880825OF
Patrick D. McConnell (hereafter "McConnell")	File No. BPH-880825OI
Valentine Broadcasting Company, Inc. c/o James M. Valentine (hereafter "Valentine ")	File No. BPH-880825OM
Anne L. Moss (hereafter "Moss")	File No. BPH-880825OP

For Construction Permit
for a New FM Station on Channel 283A
in Knoxville, Tennessee

HEARING DESIGNATION ORDER

Adopted: October 16, 1990; Released: December 12, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Frazier*. An engineering study reveals that Frazier incorrectly calculated the antenna height above average terrain (HAAT). Using the applicant's eight radial values for height of radiation center above average terrain, our study determined the HAAT to be 168 meters. The applicant indicated an HAAT value of 164 meters in Item 7(b)(3) of Section V-B of the application. In this case, the discrepancy is neither a tenderability nor an acceptability defect, insofar as the minimal nature of the defect appears attributable to the imprecision inherent in manually ascertaining from the Commission's propagation curves the exact radiation value corresponding to the maximum permitted under the rules. Therefore, the discrepancy may be resolved by an amendment. Frazier must submit such an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *Powers.* In response to Items 5 and 7 of Section II, Form 301, Powers stated in Exhibit 1 of his application that he is "employed by South Central Communications Corporation ("SCCC") as the director of its radio division, including SCCC's Station WEZK(FM), Knoxville, Tennessee." Powers' exhibit fails, however, to specify in what capacity he is employed at SCCC and WEZK(FM). Since WEZK(FM) is located in the proposed community of license, Powers' employment represents a potential violation of the Commission's cross interest policy. *See e.g. Lexington County Broadcasters, Inc.*, 42 FCC 2nd 581 (Rev. Bd. 1973). Consequently, Powers will be required to file an amendment with the presiding Administrative Law Judge, within 30 days of the release of this Order, providing a description of his position at SCCC and WEZK(FM). Upon evaluation of the requested amendment, the Judge will then determine whether a potential violation of the cross-interest policy exists.

4. *Reeves.* Andrew R. Reeves, the applicant's Secretary/Treasurer and holder of 10 percent of issued and outstanding class A voting common shares, stated that he is presently employed by station WTVK(TV), Knoxville, Tennessee as Sales Manager. Consequently, the instant proposal may violate the Commission's cross-interest policy. *See Reexamination of the Commission's Cross-Interest Policy*, 2 FCC Rcd 3699 (1987). (The cross-interest policy essentially prevents individuals or entities from having "meaningful" cross-interest in two broadcast stations serving substantially the same area.) However, Mr. Reeves has indicated his intent to divest himself of any interest in television station WTVK(TV) in the event of grant of Reeves' application. Accordingly, in the event of grant of Reeves' application, Andrew R. Reeves will be required to sever all connections with WTVK(TV) prior to the commencement of program test authority.

5. *Spacecom.* Section II of FCC Form 301 calls for legal information regarding the applicant and, if other than a natural person, its officers, directors, stockholders and partners with attributable interests. On November 29, 1988 Spacecom filed an amendment to its application to report a change in its officers and directors. John M. Pierson became assistant Secretary of the corporation, filling the vacancy position created by the death of William Hockensmith. However, in this amendment Spacecom failed to submit all of the required Section II information with respect to this new party to the application. Spacecom will be required to submit an amendment which contains the requisite data for Mr. Pierson to the presiding Administrative Law Judge within 30 days after this Order is released.

6. Information before the Commission indicates that TLD was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City\State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings lilted above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question TLD's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against TLD in this proceeding.

7. *City-Grade Coverage.* Applicants Knoxville FM, Knox County, McDonald, Powers, Reeves, CAB, and Kerman all filed requests for waiver of 47 C.F.R. § 73.315. However, the Commission no longer requires a waiver of 47 C.F.R. § 73.315(a) when more than 80% of the community of license will be served within the 3.16 mV/m contour. *See John R. Hughes, Inc.*, 50 Fed. Reg. 5679 (Feb. 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). Since it is readily apparent that all applicants do cover more than 80% of Knoxville, Tennessee, the waiver requests are not necessary and thus, the waivers filed will be dismissed as moot.

8. *Scott Media.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Scott Media has not completed Item 4 correctly. Scott Media's application did not give the residence address for Doris Scott-Crawford, Wilhelmima C. Gray, Geraldine C. Hall and Kent Foster. Accordingly, Scott Media must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Adminstrative Law Judge after this Order is released.

9. On December 19, 1988 Scott Media amended its application to report a change in its officers and directors and to add a new general partner: Wilhelmima Gray. However, in this amendment Scott Media failed to provide the requisite Section II information required of all principals to the application. (*See* paragraph 5) Scott Media will be required to submit an amendment which contains this information to the presiding Administrative Law Judge within 30 days after this Order is released.

10. *Kerman.* Kerman indicates in its application that it intends to mount its antenna on the WVIK-FM existing tower. However, the Commission's Antenna Survey Branch has no record of an existing tower at the coordi-

nates specified in the application. Accordingly, since no determination has been received as to whether the antenna proposed by Kerman would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the preceeding.

11. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Valentine would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

12. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Knox County	August 2, 1989 and May 4, 1990
McDonald	April 2, 1990
Spacecom	January 30, 1989, March 13, 1989, April 20, 1989, August 18, 1989, October 10, 1989, November 13, 1989, January 16, 1990 and April 30, 1990
Barden	January 17, 1989, February 16, 1989, May 18, 1989, (engineering), August 8, 1989, October 6, 1989, November 21, 1989, February 27, 1990, April 12, 1990 and September 6, 1990
Eells	July 17, 1989, October 30, 1989 and January 30, 1990
Scott Media	February 1, 1989, April 11, 1989, August 23, 1989, October 16, 1989, November 9, 1989, and April 16, 1990
Jacob	March 15, 1989 and July 17, 1989
McConnell	March 16, 1989
Valentine	August 28, 1989

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

14. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

15. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of TLD.

2. To determine whether TLD's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether TLD possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Kerman and Valentine would constitute a hazard to air navigation.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

16. IT IS FURTHER ORDERED, That Frazier will be required to file within 30 days of the release of this Order an amendment correcting the engineering discrepancy detailed in paragraph two with the presiding Administrative Law Judge.

17. IT IS FURTHER ORDERED, That Powers shall submit an amendment providing a description of his position at SCCC and WEZK(FM) to the presiding Administrative Law Judge within 30 days of the release of this Order.

18. IT IS FURTHER ORDERED, That, in the event of grant of Reeves' application, Andrew R. Reeves will divest himself of all interests in and sever all connection with station WTVK(TV), Knoxville, TN prior to the commencement of program test authority.

19. IT IS FURTHER ORDERED, That Spacecom shall submit an amendment which contains the information required by Section II of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

20. IT IS FURTHER ORDERED, That the requests for waiver of 47 C.F.R. § 73.315(a) submitted by Knoxville FM, Knox County, McDonald, Powers, Reeves, CAB and Kerman ARE DISMISSED AS MOOT.

21. IT IS FURTHER ORDERED, That Scott Media shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

22. IT IS FURTHER ORDERED, That Scott Media shall submit an amendment which contains all of the information required by Section II of Form 301 to the presiding Administrative Law Judge within 30 days after the release of this Order.

23. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

24. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Knox County, McDonald, Spacecom, Barden, Eells, Scott Media, Jacobs, McConnell and Valentine ARE GRANTED, and the corresponding amendments are accepted to the extent indicated herein.

25. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

26. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

27. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Allnet Communication
Services, Inc.
Complainant,

v. File No. IC-90-05614

Bell Operating
Companies of NYNEX,
Bell Atlantic,
BellSouth, Ameritech,
Southwestern Bell,
Pacific Telesis,
Southern New England
Telephone Co.,
and American
Telephone and
Telegraph Co.
Defendants.

ORDER

Adopted: December 5, 1990; Released: December 12, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On July 20, 1990, the above-named complainant filed an informal complaint with this Commission pursuant to Section 208 of the Communications Act (the Act), 47 U.S.C. §208 and Sections 1.711 - 1.718 of the Commission's Rules, 47 C.F.R. §1.711 - 1.718. The complainant alleges that the exchange access services it purchased from the defendant Bell Operating Companies (BOCs) were provided in violation of Section 202 of the Act, 47 U.S.C. §202(a), in that "like services" were provided to AT&T by the BOCs under contracts known as Shared Network Facilities Agreements (SNFAs) at less than the tariffed rates paid by the complainant. The defendants have all filed reports generally denying the complainants' allegations.

2. There are no indications in the defendants' reports that the complaint has been satisfied. Section 1.718 of the Rules provides that when a carrier's report does not satisfy an informal complaint, the complainant may file a formal complaint pursuant to Sections 1.720 - 1.734 of the Rules, 47 C.F.R. §1.720 - 1.734. The formal complaint will be deemed to relate back to the filing date of the informal complaint if the formal complaint is filed within six months of the carrier's report, makes specific reference to the date of informal complaint, and is based on the same cause of action. Section 1.718 further provides that the complainant "will be deemed to have abandoned the unsatisfied informal complaint" if no formal complaint is filed within the six-month period. In the instant case, the six-month period for pursuing a formal complaint will expire on March 12, 1991. However, Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, provides that the Rules may be waived for good cause. In the instant case, we find that good cause exists to waive Section 1.718 and we do so on our own motion.

3. The Commission currently has underway a tariff investigation in CC Docket No. 85-166 which involves the same basic issues regarding SNFAs that underlie this complaint. *See Investigation of Special Access Tariffs of Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166 (Docket 85-166), Phase I, FCC 86-52, (released Jan. 24, 1986), *rev'd and remanded sub nom. MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988), Memorandum Opinion and Order, 4 FCC Rcd 687 (Com. Car. Bur. 1989). In *MCI Telecommunications Corp. v. Bell Tel. Co. of Pa.*, 4 FCC Rcd 8227 (Com. Car. Bur. 1989), the Common Carrier Bureau held in abeyance a number of similar complaints involving SNFAs pending resolution of the tariff investigation. Given the similarity of the instant case to the related tariff investigation, we conclude that the public interest would not be served by requiring the complainant to file a formal complaint within the six-month period specified by Section 1.718 in order to continue to pursue its claim.

4. Accordingly, IT IS ORDERED, pursuant to the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that Section 1.718 IS WAIVED and that the above-captioned informal complaint proceeding be held in abeyance pending resolution of the Docket 85-166 tariff investigation. At that time the Bureau will, if necessary, set a new deadline for the filing of a formal complaint. In the meantime, the parties are directed to retain all records that may be relevant to the complaint until the Commission has issued a final ruling in this matter.

5. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Frank H. Mirgon,
Cohen Cellular Partners,
Fair Oaks Cellular Partners,
Global Cellular Group,
Greenwell Cellular Partners,
Orangevale Cellular Partners,
Pacific Rim Cellular Partners,
Shasta Cellular Partners, and
Western California Cellular
Partners

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 1990; Released: December 12, 1990

By the Commission:

1. The Commission has under consideration an Application for Review filed on behalf of the above captioned applicants, requesting reinstatement of applications dismissed because of fee defects. In addition, Frank H. Mirgon (Mirgon) urges that, because his applications in five markets were not included in the original lotteries, new lotteries should be conducted in those markets.[1]

BACKGROUND

2. The captioned applicants had retained the services of Computerized Cellular Engineering, Inc. (CCE) to prepare and file their applications for Rural Service Area (RSA) cellular licenses, but, in the case of over 1,200 applications filed by CCE, including those filed by the captioned applicants, CCE's fee payment checks were dishonored by its Bank.[2] In January 1989, CCE requested reinstatement of one such application, arguing that the fee payment checks were dishonored due to a bank error.[3] In support, CCE submitted a letter from a bank official stating that "there apparently was a misunderstanding between Computerized Cellular Engineering and the Bank as to how the overdraft on its account would be handled." The Managing Director denied the request for reinstatement, finding that the bank letter was insufficient to establish bank error. Letter to Don Rich, February 13, 1989; *see also Establishment of a Fee Collection Program (Fee Program)*, 2 FCC Rcd 947, 957 (1987), *as modified*, 3 FCC Rcd 5987, 5992 (1988) (*Fee Reconsideration Order*).

3. On June 29, 1989, the Commission issued public notices indicating that certain RSA applications, including CCE's, had been dismissed for fee defects.[4] In response, twenty of the CCE applicants filed a joint request for reconsideration and reinstatement of their applications, arguing that the bank erroneously failed to honor CCE's checks. However, only one of the twenty applicants (Mirgon) submitted the requisite fee payment with the petition. *See* 47 C.F.R. § 1.1116(b). The Managing Director dismissed the petition with regard to the nineteen applicants that had failed to submit the underlying application fees. As to Mirgon, the Managing Director denied the petition for failure to make a "convincing showing" that the checks were dishonored due to bank error. *See* Letter to David J. Kaufman, Esquire, September 6, 1989; *see also Fee Reconsideration Order*, 3 FCC Rcd at 5992.

4. On October 10, 1989, nine of the twenty applicants jointly filed the instant Application for Review. All of the nine captioned applicants paid the requisite fees, and their applications were included on a contingent basis in all subsequent lotteries for the RSAs in which they had applied.[5] However, Mirgon had also applied for five RSAs in Georgia, but the lotteries for those RSAs were conducted on October 4, 1989. Because Mirgon's applications were not included in those lotteries, he asks that those five lotteries be conducted again with his applications included.

DISCUSSION

5. Initially, we note that all of the lotteries for the RSAs applied for by these applicants have been conducted. With the exception of the Mirgon applications in the five Georgia RSAs, all of the applications were included in the appropriate lotteries, but none was selected. Thus, as to the applications that were included in the appropriate lotteries, the Application for Review is moot. However, we will consider the Application for Review as it relates to Mirgon's applications in the five Georgia RSAs.

6. In support of his assertion of bank error with regard to the CCE checks, Mirgon contends that personnel at CCE's bank disregarded an agreement by which the bank would cover temporary shortages in CCE's account. He alleges that, under the agreement, the bank had frequently covered temporary shortages in CCE's account, and Mirgon argues that the bank would have honored the fee checks if the bank official responsible for CCE's account had been available when the checks were presented for payment. These assertions are supported by the affidavit of CCE's President and copies of CCE's account statements, allegedly demonstrating a pattern of honoring CCE checks written against insufficient funds.

7. We have indicated that we will reinstate applications dismissed when a bank dishonors a fee payment check where the applicant makes a "convincing showing, including a statement by the bank, that the failure to honor the check was entirely due to an error on the part of the bank." *Fee Reconsideration Order*, 3 FCC Rcd at 5992. While CCE's account statements indicate that the bank may have honored some checks written on insufficient funds, the affidavit of CCE's President and the account statements fall far short of the "convincing showing" required to establish bank error, particularly where Mirgon has failed to present any acknowledgment of error by the bank or even a copy of the alleged overdraft agreement between CCE and its bank. The only statement by the bank presented to us was the letter submitted by CCE in support of the earlier request to reinstate Shasta's application. But, as the language from that letter quoted at paragraph 2 indicates, the bank acknowledges at most a "misunderstanding" with CCE concerning overdrafts. The letter does not acknowledge bank error. Thus, the bank's letter and Mirgon's showing on review fail to provide the

convincing showing necessary for reinstatement based upon a claim of bank error, and Mirgon's applications are not entitled to reinstatement.

8. Mirgon also argues that his applications for the five Georgia RSAs should have been included in the appropriate lotteries on a contingent basis. Even if Mirgon had established "bank error," we believe that the practice of contingent inclusion should not be extended to applications for which there is no pending request for reinstatement. In the circumstances of this case, contingent inclusion of Mirgon's Georgia RSA applications in the October 4, 1989 lotteries would have permitted him to decide whether to file for review with foreknowledge of the result of the lottery.[6] Further, the date of the Georgia RSA lotteries was announced by a public notice of August 4, 1989, and, as indicated in the Managing Director's September 6, 1989 letter, the filing of an application for review before the date of the lotteries would have resulted in contingent inclusion of Mirgon's applications. Although the time for filing applications for review under the Commission's rules did not expire until October 10, 1989, Mirgon could have filed before the lotteries, paid the fee, and been included on a contingent basis.[7] Thus, Mirgon was in a position to prevent the alleged harm before it occurred.[8]

9. Accordingly, IT IS ORDERED that the Application for Review filed by Frank H. Mirgon, Cohen Cellular Partners, Fair Oaks Cellular Partners, Global Cellular Group, Greenwell Cellular Partners, Orangevale Cellular Partners, Pacific Rim Cellular Partners, Shasta Cellular Partners, and Western California Cellular Partners IS DISMISSED AS MOOT to the extent indicated above, and, in all other respects, the Application for Review IS DENIED.

10. IT IS FURTHER ORDERED that the Consolidated Petition for Reconsideration and Request for Re-Lottery filed by Frank H. Mirgon IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The successful applicants in the lotteries from which Mirgon's applications were excluded have filed a Consolidated Opposition to the Application for Review. Although late-filed, we will accept the pleading because, through inadvertence, there was no public notice of the filing of the Application for Review. *See* 47 C.F.R. § 1.46.

[2] In December 1988 and January 1989, the staff routinely sent notifications of these fee defects to the affected applicants at the addresses appearing on the applications.

[3] The application that was the subject of CCE's request was filed on behalf of Shasta Cellular Partners. However, it was apparent that CCE intended to use a favorable decision on the Shasta request as precedent in subsequent requests for reinstatment of other applications.

[4] Report Nos. CL-89-197 and CL-89-198, released June 29, 1989.

[5] Pursuant to normal staff practice, as explained in the Managing Director's September 6, 1989 letter, contingent inclusion in a lottery is appropriate where an applicant dismissed for a fee defect has requested reinstatement, and it does not appear that the fee question can be resolved before the lottery. To avoid a situation in which a subsequent fee decision invalidates a lottery, the staff includes the applications in the lottery and defers action on the fee question until after the lottery.

[6] Had Mirgon been included in the Georgia lotteries on a contingent basis and not been selected, we believe that it would have been highly unlikely that he would have subsequently filed for review and paid the fee, knowing that he had already lost the lottery.

[7] An early filed application for review could have been supplemented up until October 10, 1989.

[8] In any event, even if Mirgon's applications had been contingently included in the Georgia RSA lotteries, the process by which lottery numbers are assigned to applicants and the means by which winning numbers are selected indicates that Mirgon's applications would not have been selected, and the results of those lotteries would not have changed. Lottery numbers are assigned to applicants according to their position on a list of all applicants. Applicants included on a contingent basis are placed at the end of the list and receive the highest numbers. In the lottery, the winning number is picked using sets of balls numbered zero through nine. The ball picked from the first set of balls represents the first digit of the winning number, and so forth. If the digit on a ball is too high to correspond with any of the numbers assigned to the applicants, another ball is picked until a valid digit is added to the winning number. In the subject lotteries, it was not necessary to reselect any digits in the winning number. Thus, the lottery numbers that would have been assigned to Mirgon's applications, had they been included on a contingent basis, were not selected.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Editorial Amendment of Part 95, Subpart A, of the Commission's Rules Regarding the General Mobile Radio Service.

ORDER

Adopted: December 5, 1990; Released: December 12, 1990

By the Chief, Private Radio Bureau:

1. By *Report and Order* [1] of October 13, 1988, the Commission amended the General Mobile Radio Service (GMRS) Rules to increase the flexibility of the service for personal communications. At that time, Section 95.179 of the Commission's Rules, 47 C.F.R. § 95.179, was amended to prohibit employees of individual GMRS system licensees from being operators of GMRS stations. Section 95.181(b) of the Commission's Rules, 47 C.F.R. § 95.181(b), however, was not amended to prohibit such employees from communicating two-way voice messages while acting within the scope of their employment. This action removes Section 95.181(b) from the GMRS Rules in order to conform these rule sections.

2. By this action, we are also amending various other GMRS Rules to conform them to the new fee schedule adopted by the Congress in Section 3001 of the Omnibus Budget Reconciliation Act of 1989, which was signed into law on December 19, 1989.[2] In addition, certain rules have been changed to reflect the correct address of the Bureau's Licensing Division in Gettysburg, Pennsylvania.

3. Because the rule amendments adopted herein are nonsubstantive in nature, the notice and comment provisions of Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, need not be complied with. Authority for this action is contained in Section 0.331(a)(1) of the Commission's Rules, 47 C.F.R. § 0.331(a)(1).

4. Accordingly, Part 95, Subpart A, IS AMENDED, effective **February 1, 1991,** as set forth in the Appendix below.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

APPENDIX

Part 95 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 95 continues to read as follows:

Authority citation: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303.

2. Section 95.71 is amended by revising the last sentence of paragraph (a) and the first sentence of paragraph (f) to read as follows:

§ 95.71 Applying for a new or modified license.

(a) *** Individuals should submit their applications, together with the filing fee, to the address specified in the Private Radio Services Fee Filing Guide.

* * * * *

(f) A GMRS system licensee may notify the FCC of a change of name or a change of mailing address by sending a letter to the Federal Communications Commission, 1270 Fairfield Road, Gettysburg, PA 17325-7245. ***

3. Section 95.72 is added to read as follows:

§ 95.72 Applying for an STA or waiver of the rules.

Applicants requesting an STA or waiver of the rules should submit their requests, together with the filing fee, to the address specified in the Private Radio Services Fee Filing Guide.

4. Section 95.89 is amended by revising paragraph (a) to read as follows:

§ 95.89 Renewing a license.

(a) The licensee of a GMRS system may apply to the FCC to renew the license for another term (*see* § 95.105) by filling out FCC Form 574-R (or FCC Form 405-A when the licensee has not gotten FCC Form 574-R within 30 days of the expiration of the license), and sending it, together with the filing fee, to the address specified in the Private Radio Services Fee Filing Guide (unless the licensee is a governmental entity, in which case the renewal application should be sent to the Federal Communications Commission, 1270 Fairfield Road, Gettysburg, PA 17325-7245).

* * * * *

5. Section 95.107 is amended by revising paragraph (d) to read as follows:

§ 95.107 Keeping the license.

* * * * *

(d) If the license is lost, the licensee must request a duplicate document from the FCC. The request for a duplicate license, together with the filing fee, should be sent to the address specified in the Private Radio Services Fee Filing Guide.

* * * * *

6. Section 95.111 is revised to read as follows:

§ 95.111 Transfer of control of a corporation.

If the licensee of a GMRS system is a corporation, and there is a change in the control of the corporation, the licensee must request consent for the change of control from the FCC by filling out Form 703 and sending it, together with the filing fee, to the address specified in the Private Radio Services Fee Filing Guide. The FCC document granting such consent must be kept as part of the GMRS system records (*see* § 95.113).

7. Section 95.117 is amended by revising paragraph (b) to read as follows:

§ 95.117 Where to contact the FCC.

* * * * *

(b) Write to:

Federal Communications Commission
Attention: GMRS
1270 Fairfield Road
Gettysburg, PA 17325-7245

(1) To ask a question about an application or about these Rules;
(2) [Reserved]
(3) [Reserved]
(4) To notify the FCC of a new name or mailing address (*see* § 95.103);
(5) [Reserved]
(6) To return a license to the FCC for cancellation (*see* §§ 95.103 and 95.107).
(7) [Reserved]

* * * * *

8. Section 97.181 is amended by removing and reserving paragraph (b) as follows:

§ 95.181 Permissible communications.

* * * * *

(b) [Reserved]

* * * * *

FOOTNOTES

[1] 3 FCC Rcd 6554 (1988).
[2] Pub. L. No. 101-239, 103 Stat. 2106 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE CO., INC. File No. I-T-C-90-166

Application for authority to acquire and operate facilities for direct service between Hawaii and India.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 4, 1990; Released: December 12, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on August 21, 1990 by GTE Hawaiian Telephone Company Incorporated (HTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for direct service between Hawaii and India. The application was placed on public notice on September 5, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between Hawaii and India by HTC.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-166 IS GRANTED, and HTC is authorized to:

a. lease from Comsat and operate three voice-grade satellite half-circuits between an appropriate earth station in Hawaii and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between an earth station in Malaysia furnished by HTC's correspondent in India;

b. lease a one-half interest in three voice-grade terrestrial microwave circuits interconnecting the Kuantan Earth Station and Penang Cable Station in Malaysia;

c. acquire, on an Indefeasible Right of User (IRU) basis, a one-half interest in and operate five voice-grade circuits in the IOCOM cable between Malaysia and India[1]; and

d. use said facilities to provide HTC's regularly authorized services between Hawaii and India and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between HTC and its correspondent in India and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] HTC plans to activate three IOCOM half-circuits initially, with the two remaining circuits to be activated as needed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VARTEC NATIONAL, INC. File No. I-T-C-90-152

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 5, 1990; Released: December 12, 1990

By the Chief, International Facilities Division:

1. The above-captioned application filed on July 13, 1990 by VarTec National, Inc. (VarTec), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the services of other common carriers to provide switched voice and data (facsimile) service between the U.S. and international points under the provisions set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2 and US Sprint's Tariffs F.C.C. Nos. 1 and 2. The application was placed on public notice on July 25, 1990. No comments were received.

2. VarTec is a Texas corporation which resells domestic services. It now proposes to resell the International Message Telephone Service (IMTS) services of other carriers to provide IMTS and facsimile services. VarTec believes that the market is growing and that increased competition will serve the public convenience and necessity. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of IMTS and facsimile service by VarTec between the United States and those international points named in AT&T's Tariffs F.C.C. Nos. 1 and 2 and US Sprint's Tariffs F.C.C. Nos. 1 and 2.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-90-152 IS GRANTED, and VarTec is authorized to provide international switched voice and facsimile services by the resale of international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, and US Sprint's Tariffs F.C.C. Nos 1 and 2 between the U.S. and those international points named in the underlying tariffs.

5. IT IS FURTHER ORDERED that VarTec shall obtain any necessary operating arrangements in each of the countries to which it provides service and shall file with the Commission any operating agreements with its correspondents within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1989).

8. IT IS FURTHER ORDERED that nothing in this authorization shall be construed to include authorization for the transmission of money in connection with the service VarTec seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order shall be construed as containing authority for the transmission of money.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g., Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, n. 2 (released April 4, 1986).

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PUERTO RICO TELECOM CORP. File No.I-T-C-90-157

Application for authority to acquire and operate facilities for service between Puerto Rico and the Dominican Republic.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 4, 1990; Released: December 12, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on August 8, 1990 by Puerto Rico Telecom Corp. (PR Tele-Com), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities in the Transcaribbean Cable System (TCS-1) for the provision of direct service between Puerto Rico and the Dominican Republic. The application was placed on public notice on August 15, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between Puerto Rico and the Dominican Republic by PR Tele-Com.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-157 IS GRANTED, and PR Tele-Com is authorized to:

a. acquire, on an Indefeasible Right of User (IRU) basis, from AT&T a one-half interest in 48 circuits or Minimum Assignable Units of Ownership (MAUOs) in Segment G of the TCS-1 cable system; and

b. use said facilities to provide switched voice, private line, record and/or data communications services between Puerto Rico and the Dominican Republic.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between PR Tele-Com and its correspondent in the Dominican Republic, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. No substantial changes inconsistent with this or any other relevant Commission order shall be made before final execution of an IRU agreement between AT&T and PR Tele-Com, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1989).

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the appliant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

8. Puerto Rico Telecommunications shall (a) maintain separate books of account from Virgin Islands Telephone Corporation (Vitelco); (b) not own any switching or transmission facilities jointly with Vitelco; (c) use Vitelco's services, if at all, only pursuant to their published tariffs; and (d) comply with the cost allocation, customer proprietary network information, and network disclosure rules set forth in *Puerto Rico Telecommunications Services*, 2 FCC Rcd 6600 (1987).

9. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WORLD COMMUNICATIONS, INC. File No. I-T-C-91-003

Application for authority to provide international switched voice and data services to various overseas points.

ORDER AND AUTHORIZATION

Adopted: December 4, 1990; Released: December 12, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed by World Communications, Inc. (WorldCom), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide international switched voice and data services in conjunction with WorldCom's Enhanced Private Network Services between the U.S. and various overseas points. The application was placed on public notice on October 18, 1990. No comments were received.

2. WorldCom is a wholly-owned subsidiary of Tele-Columbus USA, Inc., a Delaware corporation, which in turn is a wholly-owned subsidiary of Tele-Columbus AG, which itself is a wholly-owned subsidiary of Motor Columbus AG. Tele-Columbus AG and Motor-Columbus AG are entities organized under the laws of Switzerland. WorldCom is a foreign-owned carrier under the Commission's *International Competitive Carrier* policies, 102 F.C.C. 2d 812, 842 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986), and is dominant in its provision of international common carrier services between U.S. and international points. *See Western Union Corporation and World Communications, Inc.*, 4 FCC Rcd 2219 (Com. Car. Bur. 1989).

3. As a dominant carrier in its provision of international common carrier services, WorldCom remains subject to traditional facilities authorization requirements and rate regulation. WorldCom is currently authorized to provide international private line service and international switched voice services on a resale basis. WorldCom is now seeking to provide international switched voice and data services via its own international facilities in a direct operational relationship with its foreign correspondents.

4. Our review of the record demonstrates that grant of the application will serve the public interest by increasing competition in the provision of facilities-based services to various overseas points. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1]

5. Upon consideration of the subject application, IT IS HEREBY CERTIFIED that the present and future convenience and necessity require the provision of international switched voice and data services by WorldCom between the United States and the points listed in the Appendix.

6. Accordingly, IT IS ORDERED that application File No. I-T-C-91-003 IS GRANTED, and WorldCom is authorized to use its previously authorized facilities to provide direct international switched voice and data[2] services between the U.S., on the one hand, and the points listed in the Appendix hereto, and beyond.

7. IT IS FURTHER ORDERED that WorldCom SHALL FILE copies of any operating agreement entered into by itself or its parent/affiliate with its correspondents within 30 days of its execution.

8. IT IS FURTHER ORDERED that WorldCom SHALL FILE quarterly reports of revenue, number of messages, and number of minutes of originating and terminating traffic for all countries authorized in para. 6, individually within 90 days from the end of each calendar quarter.

9. IT IS FURTHER ORDERED that the applicant SHALL FILE tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this decision.

10. IT IS FURTHER ORDERED that the applicant SHALL FILE the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

11. IT IS FURTHER ORDERED that WorldCom SHALL FILE annual traffic and revenue reports as provided in 47 C.F.R. Section 43.81 concerning traffic originating or terminating within the United States.

12. IT IS FURTHER ORDERED that WorldCom SHALL FILE additional Section 214 application to supplement existing facilities for service to any overseas points it is authorized to serve.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Algeria
Anguilla
Antigua
Aruba
Ascension Island
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Bahamas
Bahrain
Bangladesh
Barbados
Belize
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Bolivia
British Virgin Islands
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El Salvador
Ethiopia
Finland
Germany
Greece
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Guadaloupe
Guantanamo Bay
Guatemala
Haiti
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India
Indonesia
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Ireland
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Jordan
Kenya
Kuwait
Liberia
Libya
Luxembourg
Malaysia
Malta
Morocco
Netherlands Antilles
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Saudi Arabia
South Africa
Spain
St. Kitts
St. Lucia
St. Vincent & Grenadines
Suriname
Taiwan
Thailand
Trinidad & Tobago
Tunisia
Turkey
United Arab Emirates
Uruguay
Yugoslavia

FOOTNOTES

[1] *See e.g.*, cases cited in *Teltec Savings Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548 (released April 4, 1986) at n.2.

[2] WorldCom states that switched data services is intended to include facsimile and other switched non-voice services excluding telex and telegram services.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-391

In the Matter of

Amendment of Section 73.202(b), RM-7216
Table of Allotments,
FM Broadcast Stations.
(La Monte, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 14, 1990; Released: December 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5383 (1990), issued in response to a petition filed by Valkyrie Broadcasting, Inc. (petitioner), proposing the substitution of FM Channel 246C3 for Channel 246A at La Monte, Missouri. Petitioner also requested modification of its construction permit (BPH-890313MM) for Station KOSY to specify operation on the higher powered channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 246C3 for Channel 246A at La Monte, Missouri, since it could provide the community with a wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of the Commission's Rules at the site specified by petitioner.[1] We have authorized a modification of the petitioner's construction permit for Channel 246A, La Monte, Missouri, to specify operation on Channel 246C3, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
La Monte, Missouri	246C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KOSY, Channel 246A, La Monte, Missouri, IS MODIFIED to specify operation on Channel 246C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 246C3 are 38-45-09 and 93-18-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-390

In the Matter of

Amendment of Section 73.202(b), RM-7176
Table of Allotments,
FM Broadcast Stations.
(Larned, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 14, 1990; Released: December 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5380 (1990), issued in response to a petition filed by Nancy J. Puopolo (petitioner), proposing the substitution of FM Channel 295C1 for Channel 295A at Larned, Kansas. Petitioner also requested modification of her construction permit (BPH-881116MC) for Station KYSG to specify operation on the higher powered channel. Petitioner filed supporting comments in which she reaffirmed her interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 295C1 for Channel 295A at Larned, Kansas, since it could provide the community with a wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of the Commission's Rules at the site specified by petitioner.[1] We have authorized a modification of the petitioner's construction permit for Channel 295A, Larned, Kansas, to specify operation on Channel 295C1 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Larned, Kansas	244A, 295C1

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KYSG, Channel 295A, Larned, Kansas, IS MODIFIED to specify operation on Channel 295C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 295C1 at Larned are 38-13-07 and 98-59-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-164

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Ruidoso, New Mexico)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 14, 1990; Released: December 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. By *Notice of Proposed Rule Making*, 4 FCC Rcd 4904 (1989), the Commission, on its own motion, proposed the substitution of Channel 228C3 for Channel 228A at Ruidoso, New Mexico, and the modification of the license of Walton Stations - New Mexico, Inc. ("Walton"), for Station KBUY-FM to specify operation on the higher powered channel. Walton filed comments stating its intention to apply for Channel 228C3, if allotted. The Federal Aviation Administration ("FAA") also filed comments.[1]

2. We believe the public interest would be served by substituting Channel 228C3 for Channel 228A at Ruidoso, New Mexico, since it could provide the community with a wide coverage area FM service. Channel 228C3 can be allotted to Ruidoso in compliance with the Commission's minimum distance separation requirements and can be used at Station KBUY-FM's licensed transmitter site.[2] Mexican concurrence in the allotment has been received since Ruidoso is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 25, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Ruidoso, New Mexico	228C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Walton Stations - New Mexico, Inc., for Station KBUY-FM, Ruidoso, New Mexico, IS MODIFIED to specify operation on Channel 228C3, in lieu of Channel 228A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The FAA filed comments concerning this docket and other dockets initiated simultaneously. *See* 5 FCC Rcd 2152 (1990). The FAA's concerns will be treated consistent with the treatment afforded in other proceedings. 5 FCC Rcd 2152, n.4.

[2] The coordinates for Channel 228C3 at Ruidoso are North Latitude 33-23-12 and West Longitude 105-40-14. Because the rule making which resulted in this allotment was initiated prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-601

In the Matter of

Amendment of Section 73.202(b), RM-7531
Table of Allotments,
FM Broadcast Stations.
(Lenwood, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 21, 1990; Released: December 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. A petition for rule making has been filed on behalf of Desert Broadcasting ("petitioner") seeking the allotment of FM Channel 245A to Lenwood, California, as that community's third local FM service. Petitioner states its intention to apply for the channel if it is allotted.

2. A staff engineering review of petitioner's proposal has determined that Channel 245A can be allotted to Lenwood in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, without the imposition of a site restriction.[1] However, because Lenwood is located within 320 kilometers (199 miles) of the U.S.-Mexican border, the Commission must seek concurrence of the Mexican government in this proposal.

3. We believe the public interest would be served by proposing the allotment of Channel 245A to Lenwood, California, since the allotment would provide the community with an additional local FM service. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Lenwood, as follows:

	Channel No.	
City	Present	Proposed
Lenwood, California	285A, 297A	245A, 285A, 297A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 1, 1991,** and reply comments on or before **February 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Daniel F. Van Horn, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates used for Channel 245A at Lenwood are 34-52-30 and 117-06-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-387

In the Matter of

Amendment of Section 73.202(b), RM-7282
Table of Allotments,
FM Broadcast Stations.
(Rainelle, West Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 21, 1990; Released: December 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5354 (1990), issued in response to a petition filed by R-B Company, Inc., proposing the substitution of Channel 237A for Channel 244A at Rainelle, West Virginia. Petitioner also requested modification of its license for Station WRRL-FM, Channel 244A, to specify operation on the new channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 237A for Channel 244A at Rainelle, West Virginia, since it would allow Station WRRL-FM to increase its operation to 6 kW and thus expand its coverage area. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at Station WRRL-FM's present transmitter site.[1] In addition, we are modifying the petitioner's license for Station WRRL-FM, Rainelle, West Virginia, to specify operation on Channel 237A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Rainelle, West Virginia	237A

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WRRL-FM, Rainelle, West Virginia, IS MODIFIED to specify operation on Channel 237A in lieu of Channel 244A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WRRL-FM's license, BLH-7285, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-7285, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 237A at Rainelle, West Virginia, are 37-57-28 and 80-45-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-456

In the Matter of

Amendment of Section 73.202(b),	RM-6399
Table of Allotments,	RM-6598
FM Broadcast Stations.	RM-6599
(Durango and Telluride, Colorado, and Kirtland, New Mexico)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 18, 1990; Released: December 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 5722 (1988), issued at the request of Durango Broadcasting Company ("petitioner" or "DBC"), proposing the allotment of Channel 275C to Durango, Colorado, as that community's third local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. Four Corners Communications Company, Ltd., licensee of Station KIQX(FM), Channel 267C1, Durango, filed opposing comments. Jeff and Joella Thomas (the "Thomases") filed comments and a counterproposal seeking the allotment of Channel 275C to Kirtland, New Mexico. Jerrell K. Davis ("Davis") filed comments and a counterproposal seeking the allotment of Channel 275C to Telluride, Colorado. Charles Fabrikant and Judith Brenner (collectively "Fabrikant and Brenner") also filed a counterproposal requesting the allotment of Channel 275C to Telluride, Colorado.[2] DBC filed a motion to accept comments on the counterproposals. [3] The Thomases, as well as Fabrikant and Brenner, filed responsive comments to the counterproposals. All parties filed additional comments.[4]

2. In its comments, Four Corners, licensee of Station KIQX(FM), Channel 267C1, Durango, Colorado, opposes DBC's proposal, based on technical, economic and legal grounds. Four Corners states that the terrain surrounding the site designated in petitioner's proposal would not accommodate an antenna of the minimum height necessary to accommodate a Class C station without violating FAA rules. Also, Four Corners states that two existing Class C FM facilities located on Smelter Mountain (petitioner's suggested site) have elected to downgrade to Class C1 status due to the impractibaility of achieving full Class C status at that site. Four Corners also notes that other area radio stations have recently gone dark, and expresses doubt whether another station could survive in such a weak market. Finally, Four Corners alleges that it purchased Station KIQX(FM) from Dan Lacey, whose spouse is the sole owner of DBC. The covenant signed in relation to the sale states that Dan Lacey, or a company in which he holds more than a 25% share, cannot own a radio station in the area of Durango. Four Corners suggests that this contractual provision would leave no eligible applicant for the channel, because it would bar DBC from applying for the channel.

3. In their comments and counterproposal, the Thomases assert that their proposal to allot Channel 275C to Kirtland, New Mexico (population 2,358)[5] would serve the public interest better than DBC's proposal, because it would provide Kirtland with its first local broadcast service, instead of providing a third local FM service to Durango. The Thomases note that in the *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 51 RR 2d 807, *recon. den.* 56 RR 2d 448 (1982), the Commission reiterated that service of local origin to as many communities as possible is a significant objective to be served by the FM Table. The Thomases affirm their intention to apply for Channel 275C, if allotted.

4. Davis counterproposes the allotment of Channel 275C to Telluride, Colorado (population 1,047), instead of Durango, since it could provide Telluride with its first local FM service, as opposed to enhancing service at Durango. Davis also states that although Telluride's year round population is small, the winter influx of skiers into the Telluride area (a resort community with a popular ski area nearby), boosts its seasonal population to approximately 4,000 persons. Thus, Davis believes that Telluride warrants a first local FM service. Davis comments that if Channel 275C is allotted to Telluride, he will apply for authority to construct a station there.

5. In their counterproposal, Fabrikant and Brenner also state that Channel 275C should be allotted to Telluride, Colorado, since it could provide a first local FM service to that community, in contrast to an additional FM service at Durango. Fabrikant and Brenner assert that they too will apply for Channel 275C, if it is ultimately allotted to Telluride.

6. DBC filed comments in response to the counterproposals in this proceeding. Also, DBC disputes the arguments made by Four Corners. DBC states that the competitive situation in Durango is not a relevant issue, that the covenant not to compete does not apply in this case, and that the technical arguments regarding antenna height and location have not been substantiated. However, in order to resolve the conflict in this proceeding, DBC suggests we consider Channel 259C2 as an alternate to Channel 275C at Durango. DBC affirms its intention to apply for Channel 259C2, if allotted to Durango.

7. The Thomases and Davis jointly filed further comments in which they suggest the allotment of Channel 275C to Kirtland and Channel 285C1 to Telluride. Fabrikant and Brenner, the other counterproponent at Telluride, filed a response to the further comments insisting that only a Class C channel should be allotted to Telluride.

8. After carefully reviewing the proposals before us, we believe that all are meritorious. Since DBC has stated its willingness to apply for Channel 259C2 at Durango, in lieu of Channel 275C, its proposal may be granted without denying any other proposal before us.

9. In view of the fact that Davis has expressed a willingness to apply for Channel 285C1 at Telluride, thus removing a conflict with Kirtland, and in view of the fact that Fabrikant and Brenner, although objecting to the allotment of a Class C1 rather than a Class C channel, have not made any showings that a Class C station would

provide a first or second fulltime aural service, or that, given Telluride's size and transient population, a Class C1 channel is insufficient to provide coverage to that community, we believe that public interest considerations warrant the allotment of Channel 285C1 to that community. This makes possible the allotment of a Class C channel to Kirtland, New Mexico.

10. A staff engineering analysis has determined that Channel 259C2 can be allotted to Durango, Colorado, as proposed by DBC, in conformity with the minimum distance separation requirements of the Commission's Rules.[6] Channel 285C1 can be allotted to Telluride, Colorado, without the imposition of a site restriction.[7] Channel 275C can be allotted to Kirtland, New Mexico, with a site restriction 36.6 kilometers (22.7 miles) north[8] of the community to avoid short-spacing to Channel 276A (vacant) at Window Rock, Arizona.[9]

11. In view of the above, we believe the public interest would be served by allotting Channel 259C2 to Durango, as that community's third local FM service, allotting Channel 285C1 to Telluride, Colorado, as that community's first local commercial FM service, and allotting Channel 275C to Kirtland, New Mexico, as that community's first local broadcast service.

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Durango, Colorado	259C2, 263C1, 267C1
Telluride, Colorado	285C1
Kirtland, New Mexico	275C

13. IT IS FURTHER ORDERED, That the counterproposal filed by Charles Fabrikant and Judith Brenner, proposing the allotment of Channel 275C to Telluride, Colorado, IS DISMISSED.

14. The window period for filing applications on Channel 259C2 at Durango, Colorado, Channel 285C1 at Telluride, Colorado, and Channel 275C at Kirtland, New Mexico, will open on **January 28, 1991,** and close on **February 27, 1991.** [10]

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

16. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Telluride, Colorado, and Kirtland, New Mexico, have been added to the caption.

[2] Public Notice of the three counterproposals (the Thomases, Davis, and Fabrikant and Brenner) was given on December 7, 1988.

[3] DBC states that it requested information regarding a new filing period in a letter dated December 1, 1988, addressed to the Commission's Docket Section. However, DBC asserts that it was never notified of the new filing dates. DBC then filed a motion to accept its responsive comments to the counterproposals. *See* Sections 1.46(b) and 1.45(e) of the Commission's Rules.

[4] These comments consist of (Joint) Further Comments of the Thomases and Davis, Response of Fabrikant and Brenner to the Joint Further Comments, Reply to Response by the Thomases, Reply to Further Comments and Response to Replies of Fabrikant and Brenner, the Thomases and Davis, by DBC. Although those comments were filed after the period specified therefor in this proceeding, they provide information permitting resolution of this proceeding without denial of any of the acceptable proposals before us. Thus, they have been accepted for consideration. *See* Section 1.425 of the Commission's Rules.

[5] Population figures cited herein are based upon the 1980 U.S. Census, unless otherwise indicated.

[6] Coordinates for Channel 259C2 at Durango are 37-16-30 and 107-52-42.

[7] Coordinate for Channel 285C1 at Telluride are 37-56-06 and 107-48-36.

[8] Coordinates for Channel 275C at Kirtland are 37-01-45 and 108-10-36.

[9] Coordinates for Channel 276A at Window Rock, Arizona, are 35-40-50 and 109-03-07.

[10] Because these allotments are made as a result of a petition for rule making filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WPIX, INC. File No. BRCT-890201LL

For Renewal of the
License of Commercial
Television Station WPIX(TV)
New York, New York

MEMORANDUM OPINION AND ORDER

Adopted: November 29, 1990; Released: December 14, 1990

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it: (1) a license renewal application of WPIX, Inc. ("WPIX"), licensee of commercial television station WPIX(TV), Channel 11 (Ind.), New York, New York; (2) a Petition to Deny filed by the Newspaper Guild of New York, Local 3, AFL-CIO, CLC ("Guild"); (3) the Joint Comments of the National Hispanic Media Coalition ("NHMC") and the National Puerto Rican Forum ("NPRF"); (4) oppositions filed by WPIX; and (5) the Guild's reply.[1]

2. The Guild contends in its petition to deny that WPIX's employment practices over the past several years have been marked by a series of law violations that raise serious questions regarding WPIX's qualifications to continue as a licensee. In this regard, the Guild lists three final adjudications against WPIX for violations of the following state or federal laws: (1) Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as determined by the National Labor Relations Board and confirmed by the United States Court of Appeals for the Second Circuit; (2) the Age Discrimination in Employment Act, as determined by jury trial; and (3) New York State labor law, as found by the New York State Department of Labor. The Guild notes that WPIX has also been cited for six violations of the Occupational Safety and Health Act, three of which, it notes, the Department of Labor concluded were "serious." The Guild recognizes that the Commission has limited the types of non-FCC misconduct that it would consider relevant in assessing the character qualifications of renewal applicants. *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C. 2d 1179 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986) (*"Character Qualifications I"*). More recently, the Commission modified this policy in *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd. 3252 (1990) (*"Character Qualifications II"*). However, the Guild asserts that the Supreme Court's decision in *Community Television of Southern California v. Gottfried*, 459 U.S. 498 (1983), decided prior to *Character Qualifications I*, still requires that the Commission consider the relevance of all adjudicated violations of state and federal statutes in determining whether or not to renew a license.[2] The Guild argues that the adjudicated unfair labor practices that WPIX has engaged in have caused a reduction in the number and morale of WPIX(TV)'s employees, which, in turn, has caused a reduction in service to the public. The Guild requests that the Commission conduct an evidentiary hearing to determine whether these adjudicated violations, viewed separately or together, demonstrate that renewal of WPIX's license would not serve the public interest.

3. With regard to the station's special programming obligations, the Guild notes that in 1976, the Commission, in *Third Report and Order*, 62 F.C.C.2d 604, 608 (1976), *aff'd. sub nom. New Jersey Coalition for Fair Broadcasting v. FCC*, 574 F.2d 1119 (3rd. Cir. 1978), accepted WPIX(TV)'s undertakings to take certain steps to insure that stations licensed outside of New Jersey would provide programming to New Jersey viewers; *e.g.*, deploying a remote camera crew to New Jersey on an average of at least 100 days per year and producing four special programs over the license term. The Guild states that it is unclear from its review of WPIX's renewal application that WPIX has satisfied these special service commitments. The Guild also argues that WPIX has failed to meet its general programming obligations to New Jersey. In this regard, the Guild asserts that in the five years since the renewal of WPIX's license in 1984, WPIX has scaled back its news coverage of events in New Jersey and its other New Jersey programming, and virtually has abandoned its New Jersey Bureau. For example, the Guild notes from its review of WPIX's renewal application that WPIX reduced the number of its New Jersey-related news assignments, editorials, and "public affairs and other programs" from a high of 601 in 1985 to a low of 238 in 1988. In addition, the Guild states that the series "Focus New Jersey" was eliminated, as was the regularly scheduled 2 1/2 minute summary of New Jersey news hosted by Frank Casey. With regard to WPIX's New Jersey Bureau, the Guild states that prior to 1984, WPIX staffed the Bureau with a full-time Bureau Chief and a full-time assistant, but that in the past few years, the office has been staffed either part-time or sporadically. Thus, the Guild claims that the foregoing raises substantial and material questions of fact regarding the adequacy of WPIX's service to New Jersey.

4. In its opposition, filed before the modification of the Commission's character policy in May of this year, WPIX notes that the Commission concluded in *Character Qualifications I* that the only non-FCC misconduct that was relevant in determining the qualifications to operate a broadcast station are the character traits of "truthfulness" and "reliability" and thus the Commission would only consider three types of misconduct: (1) fraudulent statements to government agencies; (2) certain criminal convictions; and (3) violations of broadcast-related anticompetitive and antitrust statutes. Thus, WPIX first argues that under current Commission policy, initially adopted in 1985, the few, isolated instances of non-FCC misconduct cited in the Guild's petition, and which the Guild admits, are not the type of misconduct considered relevant to the Commission's evaluation of a renewal applicant's character qualifications and its fitness to remain a Commission licensee. Therefore, WPIX states, that the Guild has not made out a *prima facie* case that grant of its renewal application would not be in the public interest.

5. In any event, WPIX also argues that the petitioners have still failed to show any nexus between the alleged violations of other federal and state laws and the licensee's ability to carry out its responsibilities to the public and the Commission. In this regard, WPIX submits the declaration of its President, Leavitt J. Pope, to respond to the Guild's allegations concerning the adequacy of the service provided by WPIX(TV) to New Jersey. First, WPIX notes that the Guild does not specifically allege that WPIX(TV) has failed to provide a remote camera crew or other production facility in New Jersey on the average of at least 100 days per year, as required by the *Third Report and Order*. Mr. Pope's declaration states that WPIX electronic news-gathering facilities and crew were deployed in New Jersey on an average of approximately 160 days per year during the license term. He also asserts that WPIX has satisfied all elements of its New Jersey service commitment, including its undertaking to produce at least four special programs each year concerning issues of importance to New Jersey, and that WPIX broadcast several special programs directed to New Jersey issues or events over and above the four prime time specials listed for illustrative purposes in its renewal application. In addition, he notes that, while the Guild attacks WPIX for reducing the number of editorials produced in New Jersey during the license term, it does not dispute the fact that WPIX regularly produced on location in New Jersey, throughout the period, a large number of editorials of relevance to New Jersey. Further, WPIX directly contradicts the Guild's argument that WPIX abandoned its New Jersey Bureau, stating that, although the Bureau was not fully staffed on a full-time basis, a bureau chief or manager was on the premises for much of the period, and a camera crew typically reported there five days a week. Finally, WPIX argues that, while the number of news reports and editorials produced in New Jersey fluctuated from year to year, the station regularly presented programming that addressed important issues of special relevance to New Jersey viewers in each year of the previous license term, as illustrated by the numerous examples submitted. Therefore, WPIX maintains that the Guild has failed to demonstrate that a hearing is required with respect to WPIX's service to New Jersey.[3]

6. The NHMC and the NPRF argue that the number of Hispanics employed in the Top-Four job categories does not meet the Commission's guidelines. They also argue that none of WPIX's 17 officials/managers and none of its 17 sales executives are Hispanic. In addition, NHMC and NPRF argue that WPIX has not conducted an on-going self-evaluation of its minority recruitment program, including its referral sources, as required by the Commission's rules and policies.

7. WPIX responds by stating that it has hired Hispanics in accordance with the Commission's guidelines. In this regard, it notes that, if the appropriate workforce statistics are used, WPIX satisfies the guidelines both for "total minority employment" and for the employment of Hispanics. With respect to its hiring of Hispanic managers, officials and sales managers, it argues that it is committed to recruiting Hispanics on all levels, even though the Commission's evaluation focuses on minority employment within the aggregate top-four categories. Finally, WPIX states that, although it regularly reevaluates the effectiveness of its recruitment sources, the lack of referrals from the particular EEO sources identified by NHMC/NPRF is not indicative of the general success or failure of the station's EEO program in attracting qualified Hispanic candidates. WPIX notes that during the license term, the number of Hispanics employed at the station has almost doubled, notwithstanding a significant reduction in the station's overall workforce.

DISCUSSION

8. In assessing the merits of a petition to deny, a two-step analysis is required under Section 309(d)(1) and (2) of the Act, as reiterated in *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). The first test is whether the petitioner has demonstrated by specific allegations of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity. If so, then the second test is whether the entire record before us still shows that there is a substantial and material question of fact to warrant further inquiry. We note further that if the facts are not disputed, but disposition turns on inferences to be drawn from facts already known and the legal conclusions to be drawn from the facts, a hearing is unnecessary. *Stone v. FCC*, 466 F.2d 316, 323 (D.C. Cir. 1972).

9. *WPIX's General Programming Obligations*. With respect to the licensee's general programming obligations, we note that we have eliminated previous guidelines that television licensees provide specified quantities of certain types of non-entertainment programming. *See Commercial TV Stations*, 98 FCC 2d 1076, 1090-92 (1984). Instead, we have granted licensees broad discretion to choose, in good faith, which issues are of concern to the community and to choose the best way to address those issues. The Commission will not interfere with the broadcaster's judgment without a showing that the broadcaster was unreasonable or discriminatory in its selection of issues *Commercial TV Stations*, 98 FCC 2d at 1092-94; *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1414, 1431 (D.C. Cir. 1983). Thus, the Guild has a heavy burden to show that WPIX has abused its discretion. *Commercial TV Stations*, 98 FCC 2d at 1093-94.

10. The Guild's petition alleges that WPIX has failed to meet its general programming obligations because it reduced the amount of its New Jersey related programming. In this regard, the Guild states that WPIX reduced the number of New Jersey related news assignments, editorials, and "public affairs and other programs" from a high of 601 in 1985 to a low of 238 in 1988 and that other New Jersey related series have been eliminated. However, apart from the fact that these numbers do not indicate an average, which would reflect a truer picture of WPIX's programming, such a reduction does not necessarily demonstrate a station's failure to meet its programming obligations. The Guild also notes that two New Jersey related programs or segments have been eliminated, but it fails to allege how this affects WPIX's overall New Jersey related programming. The same is true of its allegations with regard to WPIX(TV)'s New Jersey Bureau.

11. Moreover, WPIX states that WPIX(TV) has devoted substantial program time to the coverage of issues of special relevance to New Jersey. For example, its locally produced public affairs program, "Best Talk in Town," has included guests and topics such as New Jersey Governor Thomas Kean discussing the asbestos problem in New Jersey schools, U.S. Representatives Matthew Rinaldo and James Florio, both of whom respresent New Jersey, discussing toxic dump sites in New Jersey; and

Jersey City Mayor Gerald McCann, discussing gentrification of Jersey City and its effect on housing for Hispanics, to name a only a few programs.

12. With regard to the Guild's claim that WPIX "virtually abandoned" its New Jersey news bureau, we note that the Guild's only support for this allegation is a newspaper article which does not show how, if true, it affects WPIX(TV)'s overall service to New Jersey. Newspaper articles, of course, do not meet the statutory standard of "an affidavit of a person with personal knowlege of the fact alleged, as required by Section 309(d) of the Rules. This allegation is directly contradicted by WPIX's renewal application, which reports that a bureau chief or manager was on the premises at the bureau for much of the license period and that a camera crew typically reported there daily, often joined by a reporter.

13. *WPIX(TV)'s Special New Jersey Programming Obligations.* While WPIX is primarily responsible for serving New York, New York, its city of license, the Commission accepted, in the *Third Report and Order*, 62 FCC 2d 604 (1976), WPIX's special commitments to serve the New Jersey area. These commitments consisted of deploying a remote camera crew or other production facility on an average of at least 100 days per year, which is not limited to spot news coverage, and devoting a portion of this time to the production of editorials at remote locations in New Jersey and the production of four special programs per year directed to New Jersey events." *Id* at 608-609.

14. We find that the Guild has failed to make a *prima facie* case regarding WPIX's special service obligations to New Jersey, as set forth in the Commission's *Third Report and Order*. In this regard, the Guild has not alleged that WPIX failed to meet its special service obligations to New Jersey, as set forth in the *Third Report and Order*. Rather, the Guild merely states that it is unclear from WPIX's renewal application whether WPIX has met its special service obligations. Moreover, we have carefully reviewed the record before us and find that WPIX has satisfied all elements of its New Jersey service commitment. Mr. Pope's declaration is in fact an affidavit from him attesting to his first-hand knowledge of the facts alleged. He states that WPIX had a "physical presence" in New Jersey for approximately 160 days per year during the license term. This is not disputed by the Guild. The Pope declaration also states that WPIX produced more than four prime time specials directed at New Jersey events, as described by the *Third Report and Order*. For example, it states that for each year during the period from 1984 through 1988, WPIX(TV) broadcast the "United Negro College Fund Telethon," which ran for four to six hours each year, and which included, each hour, a segment broadcast live from New Jersey featuring prominent residents of New Jersey. In addition, on various occasions, WPIX broadcast "New Jersey Now," hosted by the senior United States Senator from New Jersey, Bill Bradley, reporting on developments of relevance to New Jersey. In 1988, the station broadcast the special programs, "Celebrate the Season," "Commuter Stress," and "Women of Atlantic City," each of which it states was focused on New Jersey issues or people. With respect to its undertaking to devote a portion of its broadcasts to the production of editorials at remote locations in New Jersey, WPIX notes that during the period 1984 through 1988, the station taped approximately 200 editorials on location in New Jersey, which covered such subjects as airport noise (Newark International Airport); Historic Preservation and Tax Reform (Van Vorst Park, Jersey City, NJ); and Industrial Revitalization Committee (Jersey City, NJ).

15. *Character Qualifications.* First, we do not disagree with the Guild that prior to the Commission's decision in *Character Qualifications I* , the Commission considered the relevance of federal and state law violations, other than those listed subsequently in *Character Qualifications I*. However, given the Commission's limited resources in reviewing such a broad range of non-FCC misconduct, among other things, the Commission limited the type of non-FCC misconduct it would henceforth consider relevant in evaluating renewal applications. *See Character Qualifications I*, 102 FCC 2d at 1195-1197, 1200-1203. We find, and the Guild concedes, that WPIX's adjudicated violations constitute non-FCC misconduct and that they do not fall within the ambit of relevant, non-FCC misconduct contemplated by the Commission. None of the matters adjudicated against WPIX are felonies, nor do those violations suggest any lack of truthfulness or candor in its dealings with this or any other regulatory body, based on the information submitted by the petitioners. Nor do these derelictions appear to be widespread or evidence a continuing pattern of violations. Moreover, we note that the corrective actions or sanctions that have been delivered against WPIX, by the government bodies with such authority and expertise, appear to be sufficient. Therefore, we conclude that the Guild has failed to raise a *prima facie* case in this regard.[4] Moreover, while the Guild has alleged that "dozens" of employees in WPIX's news department have left their jobs and that morale is low, allegedly based on WPIX's unfair labor practices, it has failed to demonstrate how WPIX's service to the public has been adversely affected. Further, we have already found that WPIX has met its general programming obligations and its special obligations to serve New Jersey, as set forth in the *Third Report and Order*, discussed supra, paras. 9-14. Accordingly, we find no substantial and material issues regarding whether the renewal of WPIX's license would be contrary to the public interest.

16. *EEO Obligations.* Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. In the absence of discrimination, our primary concern is the broadcaster's EEO efforts. We have reviewed WPIX's renewal application and record with regard to the EEO violations alleged by the NHMC/NPRF and find that WPIX has complied with our EEO rule (Section 73.2080) and policies.

17. It appears from WPIX's renewal application that the station utilized a wide variety of minority recruitment sources among those available to it, including a number of Hispanic recruitment sources. In addition to the media organizations and educational institutions recognized by the NHMC/NPRF, WPIX also utilized a substantial number of minority/women organizations for recruitment purposes, which alone generated 121 minority referrals in the past 12 months. Moreover, in reviewing WPIX's hiring practices in comparison with the New York PMSA Hispanic workforce, as set forth in the 1980 Census, we do not find any underrepresentation of Hispanics. The New York PMSA workforce is 14.4 percent Hispanic. On the basis of this figure, WPIX should endeavor to employ at least 12 Hispanics in the upper-four job categories and 15

Hispanics in its overall workforce in order to meet the Commission's 50-percent of parity guideline. WPIX's EEO Report (FCC Form 396) filed with its renewal application shows that, as of December 31, 1988, it has met this guideline by employing 13 Hispanics out of 162 employees on its upper-four staff and 22 Hispanics out of 204 employees on the station's overall workforce.[5] Moreover, the NHMC/NPRF has failed to present evidence to demonstrate that Hispanics are underrepresented in overall upper-four hiring. While the station's 1988 Employment Report shows that no Hispanics are employed in sales positions or as officials or managers, as noted by the NHMC/NPRF, the Commission has previously stated that it looks at a station's overall employment, including all upper-four job categories, rather than one category in assessing a station's EEO performance. *See Carolina Christian Broadcasting, Inc.*, 3 FCC Rcd 1907 (1988). Absent evidence raising a question of discrimination in the overall upper-four categories, the Commission will not question the licensee's discretion in placing employees in particular positions. *See Baltimore Metropolitan Broadcast Stations*, 89 FCC 2d 1183, 1184 (1982).

18. Based on the foregoing, we find that the neither the Guild nor the NHMC/NPRF has established a *prima facie* case or raised any substantial and material question of fact requiring resolution in a hearing. We further find that the applicant is fully qualified and grant of the renewal application serves the public interest, convenience and necessity.

19. Accordingly, IT IS ORDERED, That the petition to deny filed by the Newspaper Guild of New York, Local 3, AFL-CIO, CLC and the joint comments filed by the National Hispanic Media Coalition/National Puerto Rican Forum ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

FOOTNOTES

[1] In its opposition to an earlier informal objection filed by the Guild, WPIX challenged the Guild's standing on the grounds that the Guild had not demonstrated the requisite causal connection between the alleged injury (unfair labor practices) and the administrative relief it requested (denial of the station's license). We find however, that the Guild alleged sufficient facts which, if true, would demonstrate a nexus between the injury and service to the public, warranting denial of WPIX's license. Moreover, the Guild has provided an affidavit of its representative, claiming that he is a resident of the service area of WPIX(TV). The Guild's petition will, therefore, be considered on the merits. *See NAB Petition for Rulemaking*, 82 FCC 2d 89, 98-99 (1980).

[2] For example, the Guild notes that prior to *Character Qualifications I*, the Commission recognized that a licensee's willingness to discriminate on the basis of race raised a question regarding its service to the public. The Guild argues that the same considerations apply to age discrimination. The Guild also notes that the Commission previously considered that unfair labor practices might be relevant to the public interest finding where there is a nexus between the impact on employees and potentially substantial adverse effects upon service to the public.

[3] The Guild's reply reiterates substantially the arguments set forth in its petition to deny.

[4] To the extent that the Guild argues that we consider the relevance of non-FCC misconduct beyond that indicated in either of the Commission's decisions regarding character qualifications, we do not believe it is appropriate to revisit in this renewal proceeding an issue that was fully explored and considered in the rulemaking proceeding from which the Commission's policy evolved.

[5] NHMC/NPRF alleges, based on adjusted figures provided by the U.S. Department of Labor, that the New York PMSA workforce includes at least 18.4 percent Hispanics. The Commission's EEO Branch presently utilizes statistics derived from the 1980 Census, as modified in 1983, unless it can be shown that other statistics are more reliable. However, even assuming the NHMC/NPRF's citation of an 18.4% Hispanic workforce, we find that WPIX's employment of Hispanics is sufficient to meet our EEO Rule. Moreover, employment of minorities at WPIX as a whole is well over the 50% guideline, there being 73 minorities out of 204 employees (35.8%) employed on the station's overall staff and 45 minorities out of 162 employees (27.8%) employed on the upper four staff as of December 31, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS COMMUNICATIONS, INC.
Complainant,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY. File No. E-91-003

NORTHWESTERN BELL TELEPHONE COMPANY, File No. E-91-004

PACIFIC NORTHWEST BELL TELEPHONE COMPANY, File No. E-91-005
Defendants.

ORDER

Adopted: December 4, 1990; Released: December 13, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 2, 1990, Cable & Wireless Communications, Inc. (hereinafter the "Complainant") filed the above-captioned formal complaints against The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (hereinafter the "Defendants") seeking recovery of damages for Defendants' alleged overearnings on interstate access charges for the period January 1, 1987 through December 31, 1988. On November 21, 1990, however, Complainant filed a motion for leave to withdraw the complaints stating that the parties had entered into a formal resolution of this matter and that there was no longer any need for these proceedings.

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. 0.291, that Complainant's Motion for Leave to Withdraw Complaint IS GRANTED and that the above-captioned proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MR. AND MRS. ROBERT DINGHAM,
Complainants,

v. File No. E-89-276

SOUTHWESTERN
TELEPHONE
COMPANY,
Defendant.

ORDER

Adopted: December 5, 1990; Released: December 13, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a joint motion filed on November 26, 1990, by the parties in the above-captioned proceeding requesting that we dismiss the complaint with prejudice. We have fully considered the motion and grant the requested relief.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. 0.291, that the above-captioned complaint IS DISMISSED with prejudice and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-145

In the Matter of

Amendment of Section 73.202(b),	RM-6201
Table of Allotments,	RM-6408
FM Broadcast Stations.	RM-6409
(Summerville, Summerton and Bowman, South Carolina)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 27, 1990; Released: December 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Millennium Communications of Charleston, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 2189 (1988), proposing the substitution of Channel 227C2 for Channel 228A at Summerville, South Carolina, and the modification of its license for Station WWWZ-FM to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. Counterproposals were filed by Savannah Radio Partnership ("SRP") requesting the allotment of Channel 227A to Summerton, South Carolina, as its first local FM service, and Robert C. Rickenbacker, Jr. ("Rickenbacker"), requesting the allotment of Channel 227A to Bowman, South Carolina, as its first local FM service.[2] Summerville is located 55 kilometers (34.2 miles) from Summerton and 54 kilometers (33.6 miles) from Bowman while the Commission's mileage separation requirements stipulate a minimum separation of 163 kilometers for co-channel Class A and C2 allotments. Bowman and Summerton are located 43 kilometers (26.7 miles) apart while the Commission's rules stipulate a minimum separation of 105 kilometers for co-channel Class A allotments. Therefore, the three proposals are mutually exclusive. [3] Petitioner, Rickenbacker and SRP filed reply comments.[4]

2. SRP requests the allotment of Channel 227A to Summerton, South Carolina, as its first local FM service. It states that Summerton, population 1,173 persons, is an incorporated city in Clarendon County.[5] Without elaboration, SRP describes Summerton as having the "usual complement of commercial activity and community organizations expected in a town of its size." In addition, it points out that Summerton is governed by a mayor and six councilmen, that it has its own local police service and volunteer fire department, and several schools and churches. Therefore, it believes that the public interest would be better served by allotting Channel 227A to Summerton than by upgrading the existing service at Summerville. SRP states that it will apply for the channel, if allotted to Summerton.

3. Rickenbacker seeks the allotment of Channel 227A to Bowman, South Carolina, as its first local FM service. He states that Bowman, with a population of 1,137 persons, is located in Orangeburg County. He states that Bowman, unlike Summerville, is located outside of the Charleston Metropolitan Statistical Area and is not a part of any other Metropolitan Statistical Area. Rickenbacker argues that the provision of a first local channel to Bowman is a higher allotment priority than the upgrading of Station WWWZ at Summerville, citing *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), *Benton Arkansas, et al.*, 2 FCC Rcd 1963 (1987), and *Newberry and Munising, Michigan*, 2 FCC Rcd 5332 (1987). Rickenbacker states that he will apply for the channel, if allotted.

4. In reply, petitioner argues that its proposal to upgrade Station WWWZ-FM at Summerville should prevail. It claims that Channels 233A and 239A are available for allotment to Bowman. It also contends that any party interested in serving Summerton could do so by applying for Channel 262A at Elloree, South Carolina. Therefore, it urges that Channel 227C2 be allotted to Summerville.

5. Rickenbacker urges the allotment of Channel 227A to Bowman. He states that the channel will provide a second fulltime aural service to 273 people in the Reevesville Census Division of Dorchester County as well as a first local transmission service to the residents of Bowman. He recognizes that the populations of Summerton and Bowman are almost identical. However, Rickenbacker contends that nearly twice as many people will receive a new service from a Bowman station than from a Summerton station (57,070 persons versus 28,868 persons). He also provides demographic data to show that Bowman is more deserving of the allotment. Specifically, he states that Bowman has seven churches and public schools which accommodate 487 elementary school students, 361 high school students, and 22 special education students. In addition, Bowman Academy, a private school, has an enrollment of between 110-140 students. Rickenbacker also notes that Bowman is home to businesses such as Bowman, Inc., V.P. Kizer Lumber Company, Wimco Farm Supplies and DBK Chemicals.

6. SRP states that the conflict between the Summerton and Bowman proposals could be solved if Channel 239A is allotted to Bowman. It states that the channel can be allotted to Bowman with an appropriate site restriction. Thus, the only conflict is between Summerton and Summerville. In this regard, it argues that it is irrelevant that a station allotted to Elloree could provide service to nearby Summerton. Rather, SRP contends that the relevant law is that every community of appreciable size is entitled to its own local service, citing *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

7. Based on the record before us, we believe that the public interest would be served by providing Bowman and Summerton with their first local FM services as well as enabling petitioner to expand the area served by its Summerville station. A comparative analysis of the competing proposals is unnecessary since a staff engineering study shows that alternate channels are available for both Bowman and Summerton. Channel 233A can be allotted to Bowman with a site restriction of 5.4 kilometers (3.4 miles) northwest to avoid a short-spacing to the construction permit of Station WSSX-FM, Channel 236C, Charleston, South Carolina. Channel 238A can be allotted to Summerton with a site restriction of 9.7 kilometers (6.1

miles) northwest to avoid a short-spacing to the construction permit of Station WAVF, Channel 241C, Hanahan, South Carolina, and Channel 227C2 can be allotted to Summerville with a site restriction of 23.7 kilometers (14.7 miles) northeast to avoid a short-spacing to Station WEAS-FM, Channel 226C1, Savannah, Georgia.[6]

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Bowman, South Carolina	233A
Summerton, South Carolina	238A
Summerville, South Carolina	227C2

9. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Millennium Communications of Charleston, Inc. for Station WWWZ-FM, Summerville, South Carolina, IS MODIFIED to specify operation on Channel 227C2, in lieu of Channel 228A, subject to the following conditions:

(a) Within 90 days of the effective date of the pending appeal in *Chester County Broadcasting Co. v. FCC*, Nos. 90-1496 *et al.* (D.C. Cir. Oct. 19, 1990), the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. The window period for filing applications for Channel 233A at Bowman, South Carolina, will open on **January 28, 1991,** and close on **February 28, 1991.** The Commission will issue a Public Notice announcing the opening of the application window period for Channel 238A at Summerton, South Carolina, after the effective date of the pending appeal in *Chester County Broadcasting Co. v. FCC*, Nos. 90-1496 *et al.* (D.C. Cir. Oct. 19, 1990).

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Summerton and Bowman have been added to the caption.

[2] Public Notice of the filing of the counterproposals was given on June 15, 1988, Report No. 1734.

[3] The petitions under consideration in this proceeding were filed before October 2, 1989. Therefore, the minimum distance separation requirements used herein are those which were in effect prior to the effective date of the new spacing requirements adopted in MM Docket 88-375. *See* 4 FCC Rcd 6375 (1989).

[4] The following unauthorized pleadings were submitted: Request of Millennium Communications for Extension of Time to File Comments, filed July 1, July 13, and July 22, 1988; Opposition to Extension of Time filed by SRP; Petition for Leave to File Comments and Comments of Millennium Communications; Erratum to Supplement to Comments and Counterproposal filed by SRP; Motion for Leave to File Supplemental Comments filed by Millennium Communications; Motion for Expedited Processing by Millennium Communications; and Opposition to Motion for Expedited Processing by Rickenbacker. Millennium requested additional time in which to respond to the counterproposals of SRP and Rickenbacker. None of the extension requests complied with Section 1.46 of the Commission's rules which requires that such requests be filed at least 7 days prior to the expiration of the comment deadline. In addition, Millennium failed to provide any reason why the requests were late filed or a request for their acceptance. Therefore, the extension requests are denied. In light of our action herein, Millennium's request for expedited action and Rickenbacker's opposition are dismissed as moot. We find that the remaining pleadings set forth information which was already available to the staff and provide no information of decisional significance. Therefore, these pleadings have not been accepted for consideration.

[5] All population figures are taken from the 1980 U.S. Census unless otherwise indicated.

[6] The coordinates for Channel 233A at Bowman are North Latitude 33-22-14 and West Longitude 80-44-02. The coordinates for Channel 238A at Summerton are 33-40-43 and 80-23-55. The coordinates for Channel 227C2 at Summerville are 33-11-17 and 80-01-27. Since the underlying petitions for Bowman and Summerton were filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1). *See* 47 C.F.R. §73.315(c). The allotment of Channel 238A to Summerton, and thus the resolution of the conflict between the Summerton and Summerville proposals, is dependent upon the denial of Chester County Broadcasting Co.'s request to, *inter alia*, substitute Channel 238A for Channel 257A at Wedgefield, South Carolina. *See Memorandum Opinion and Order*, 5 FCC Rcd 5572 (1990), *appeal docketed sub nom Chester County Broadcasting Co. v. FCC*, Nos. 90-1496 *et al.* (D.C. Cir. Oct. 19, 1990). Therefore, we will delay the opening of the application filing window for Channel 238A at Summerton and the acceptance of an application by Millennium for Channel 227C2 at Summerville until action is taken by the Court of Appeals.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-394

In the Matter of

Amendment of Section 73.202(b), RM-6864
Table of Allotments,
FM Broadcast Stations.
(North Mankato, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 19, 1990; Released: December 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 6914 (1989), proposing the substitution of FM Channel 244C3 for Channel 244A at North Mankato, Minnesota, and modification of the license for Station KDOG(FM) accordingly. The *Notice* was issued in response to a petition filed by Minnesota Valley Broadcasting Company ("petitioner"). Petitioner filed comments restating its interest in the channel. Olmstead County Broadcasting Co. ("Olmstead") filed reply comments. Petitioner filed additional comments.[1]

2. Although the *Notice* stated that Channel 244C3 could be allotted to North Mankato consistent with the Commission's spacing requirements at the petitioner's specified site, 8.7 kilometers (5.4 miles) south[2] of the community, the allotment was contingent upon the grant of a license to cover the construction permit (BPH-880811IA) issued to Station KWWK(FM), Channel 244A, Rochester, Minnesota, to operate on Channel 243C2.

3. In its comments, petitioner states that a site was initially selected as close to the city of license as possible but, in an effort to remove the conflict with Station KWWK(FM), Rochester, and provide increased service to the public in a timely fashion, petitioner now proposes new reference coordinates. [3] According to petitioner, the new site is approximately 12 kilometers (7.5 miles) southwest of the community, fully spaced with the present KWWK(FM) facility, and meets all other technical requirements. Petitioner concludes that the proposed modification at North Mankato, at the new site, can be adopted regardless of the license status of Station KWWK(FM), Rochester.

4. Olmstead, licensee of FM broadcast Station KWWK, Channel 244A, Rochester, Minnesota, informs us that it has requested a modification of its construction permit to change the site for its operation of Channel 243C2. Olmstead notes that its new site will clear petitioner's original Class C3 proposal by approximately 16.1 kilometers (10 miles). Olmstead acknowledges petitioner's new site and questions whether the new site will be processed under the old or the new separation requirements. Olmstead urges the Commission to adopt the proposal contained in the *Notice*.

5. Petitioner responds that Olmstead's modification proposal at Rochester is not affected by its proposal, regardless of whether the reference coordinates contained in the *Notice*, or those suggested in its comments as an alternate consideration, are used. Petitioner urges that its alternate site serves merely to remove the contingency placed on its proposal with regard to the existing licensed site of Station KWWK(FM) on Channel 244A at Rochester.[4] Petitioner states that Olmstead's concern appears to center on whether its alternate site would be evaluated pursuant to the provisions of Section Section 73.213(c) of the Commission's Rules (the "old" minimum distance spacing requirements), or those specified in Section 73.207(b). Petitioner states that if its alternate proposal is not afforded "grandfathered" protection, it would be short-spaced to the licensed site of Station KWWK on Channel 244A.[5] However, petitioner urges that its proposal was filed prior to the October 2, 1989 effective date of the *Second Report and Order* in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989), which increased the maximum power for Class A facilities to 6 kW and adjusted the minimum distance spacing requirements accordingly. Petitioner asserts that in accord with the *Second Report, supra*, at paragraph 57, it is entitled to consideration pursuant to the provisions of Section 73.213(c) of the Commission's Rules. In further support of its proposal, petitioner advises that its site change request does not alter any other aspect of its proposal, but merely serves to remove the contingency otherwise attached thereto, thus enabling it an opportunity to provide an improved service to the public in a more expeditious manner.

6. After a careful evaluation of the proposal and comments filed in this proceeding, we believe that the public interest would be served by the substitution of Channel 244C3 for Channel 244A at North Mankato, Minnesota, since it would provide the community with its first wide coverage area FM station. In order to enable the petitioner to proceed unrestrained with the channel substitution at North Mankato, we will allot Channel 244C3 at the petitioner's revised site, which is 10.4 kilometers (6.5 miles) southwest[6] of the community, rather than at the site 8.7 kilometers (5.4 miles) south of the community as proposed in the *Notice*. Use of the petitioner's revised site removes the contingency placed on its proposal in the *Notice*, since it is now fully spaced to the licensed site of Station KWWK(FM).[7] Moreover, since the petitioner's proposal was filed prior to October 2, 1989, the effective date of the new spacing requirements, and the change in site does not alter its request (the proposed community, channel and class of channel remain as originally proposed), the allotment of Channel 244C3 at North Mankato will be treated pursuant to the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c). Therefore, and in accordance with the provisions of § 1.420(g) of the Commission's Rules, we are modifying the license of Station KDOG(FM) to specify operation on Channel 244C3 in lieu of Channel 244A at North Mankato.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS

ORDERED. That effective **January 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
North Mankato, Minnesota	244C3

8. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Minnesota Valley Broadcasting Company for Station KDOG(FM), North Mankato, Minnesota, IS MODIFIED to specify operation on Channel 244C3, in lieu of Channel 244A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IS IS FURTHER ORDERED, that the Secretary shall send a copy of this Order by Certified Mail, Return Receipt Requested, to the following:

Olmstead County Broadcasting Co.
1220 4th Avenue, S.W.
Rochester, Minnesota 55902

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's additional comments were accompanied by a petition for leave to file, and were served on Olmstead, the only other commenter in this proceeding. Since the comments address procedural questions raised in Olmstead's reply comments, and raise no new matters, they have been accepted.

[2] Coordinates proposed in the *Notice* for Channel 244C3 at North Mankato are 44-05-47 and 94-01-02.

[3] Coordinates at the alternate site suggested by the petitioner are 44-06-38 and 94-07-49.

[4] Coordinates at the licensed site of Station KWWK(FM) are 43-59-13 and 92-25-05.

[5] The distance between petitioner's revised site for Channel 244C3 at North Mankato and the licensed site of Station KWWK(FM) on Channel 244A at Rochester is 137.9 kilometers, whereas 138 kilometers is required between co-channel Class A and C3 stations under the "old" rules. *See* Section 73.213(c) of the Commission's Rules. Under the new rules, the required protection between the two channel classes cited increases to a minimum distance of 142 kilometers.

[6] *See* footnote 3, *supra*.

[7] *See* footnote 4, *supra*. The petitioner's revised site also confers a benefit upon Station KWWK(FM) since it clears the minimum distance spacing requirements to the latter's application (File No. BPH-900727IB) at Rochester, at coordinates 44-01-59 and 92-36-10. Otherwise, where a proposed allotment and a pending application are in technical conflict, the Commission considers the applied for site as a preference for a particular location and, absent a compelling showing that use of the site would more effectively serve the public interest, instead favors the proposed allotment since it represents a new service. *See Las Vegas*, NV, 59 RR 2d 1330 (1986); and *Freedom and Morgan Hill, CA, 2 FCC Rcd 2181 (1987), recon. den.* 4 FCC Rcd 3927 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-257

In the Matter of

Amendment of Section 73.202(b), RM-6934
Table of Allotments,
FM Broadcast Stations.
(Waukon, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 19, 1990; Released: December 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. By *Notice of Proposed Rule Making*, 4 FCC Rcd 4904 (1989), the Commission, on its own motion, proposed the substitution of Channel 280C3 for Channel 280A at Waukon, Iowa, and the modification of the license of David H. Hogendorn ("Hogendorn") for Station KNEI-FM to specify operation on the higher powered channel. Hogendorn filed a counterproposal requesting the allotment of Channel 278C2 instead of Channel 280C3 to Waukon and the modification of Station KNEI-FM's license accordingly.[1] Hogendorn states that it will apply for Channel 278C2, if allotted. The Federal Aviation Administration ("FAA") also filed comments.[2]

2. We believe the public interest would be served by substituting Channel 278C2 for Channel 280A at Waukon, Iowa, since it could provide the community with a wide coverage area FM service. Channel 278C2 can be allotted to Waukon in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.6 kilometers (6.6 miles) north to avoid a short-spacing to unoccupied and unapplied-for Channel 277C3 at Asbury, Iowa. [3] As requested, we will also modify Hogendorn's license for Station KNEI-FM to specify operation on Channel 278C2 in lieu of its present Channel 280A in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Waukon, Iowa	278C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of David H. Hogendorn for Station KNEI-FM, Waukon, Iowa, IS MODIFIED to specify operation on Channel 278C2, in lieu of Channel 280A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the filing of the counterproposal was given on August 18, 1989, Report No. 1791.

[2] The FAA filed comments concerning this docket and other dockets initiated simultaneously. *See* 5 FCC Rcd 2152 (1990). The FAA's concerns will be treated consistent with the treatment afforded in other proceedings. 5 FCC Rcd 2152, n.4.

[3] The coordinates for Channel 278C2 at Waukon are North Latitude 43-21-55 and West Longitude 91-29-27. Because the petition which resulted in this allotment was filed prior to October 2, 1989, Hogendorn may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-19

In the Matter of

Amendment of Section 73.202(b),	RM-6575
Table of Allotments,	RM-6734
FM Broadcast Stations.	
(South Congaree and Batesburg,	
South Carolina)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 19, 1990; Released: December 14, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Mills Communications ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 1439 (1989), seeking comments on the allotment of Channel 226A to South Congaree, South Carolina, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. Ridgely Communications, Inc. ("Ridgely"), licensee of Station WCEZ(FM), Channel 228A, Columbia, South Carolina, filed a counterproposal requesting the allotment of Channel 237A in lieu of Channel 226A to South Congaree and the concomitant substitution of Channel 226A for Channel 237A at Batesburg, South Carolina.[2] Petitioner and Columbia Christian Radio, Inc. ("Columbia Christian"), licensee of Station WKWQ(FM), Channel 237A, Batesburg, South Carolina, filed reply comments. [3]

2. Ridgely opposes the allotment of Channel 226A to South Congaree with the site restriction proposed in the *Notice* because the allotment conflicts with its pending application (BPH-890209IC) to relocate Station WCEZ(FM)'s transmitter site. Ridgely states that it filed its application prior to the release of the *Notice* herein and was unaware of the pending proposal. Ridgely submits that on January 3, 1989, it was forced to relocate its transmitter when its antenna tower collapsed. Since that time Ridgely has been operating from an unused television tower on a temporary basis with reduced power. Ridgely points out that Station WCEZ(FM)'s tower collapsed when a truck collided with the guy wires supporting the antenna. According to Ridgely, these guy wires pass over a roadway. Ridgely believes that a similar accident could occur since the roadway is used by heavy trucks. Therefore, it has sought both special temporary and permanent authority to operate from the downtown Columbia site. Should Channel 226A be allotted to South Congaree, Ridgely states, there would be a six kilometer (3.7 mile) short-spacing between its application and the allotment. Therefore, it counterproposes that Channel 237A be allotted to South Congaree with a site restriction of approximately nine kilometers (5.6 miles) south-southwest and that Channel 226A be substituted for Channel 237A at Batesburg, South Carolina, with the license of Station WKWQ modified accordingly. As the benefitting party, Ridgely states that it will reimburse Station WKWQ for the reasonable costs associated with its change of channel. In the alternative, Ridgely requests that Channel 226A be allotted to South Congaree with a site restriction of 13 kilometers (8.1 miles) southwest. It states that the adoption of either proposal would provide a first local service to South Congaree and permit grant of Station WCEZ(FM)'s transmitter site relocation application.

3. Petitioner argues that Ridgely's counterproposal is unnecessary, contending that there is nothing intrinsically unsuitable about Ridgely's present site. It states that the "roadway" Ridgely refers to is little more than a service driveway and that the accident occurred when a garbage truck attempted to empty a trash dumpster that apparently was too close to one of the guy wires. Further, even if the site is unsuitable, petitioner states that there are several other sites available to Ridgely which are less short-spaced to the proposal, including sites on tall television and two-way towers. Petitioner submits that a South Congaree station operating from a "typical site" in the usable area for the Channel 226A allotment as proposed in the *Notice* would serve approximately 65,261 more persons than would a station operating on Channel 237A, noting that the site area available for Channel 237A would be severely restricted if Channel 238A is allotted to Wedgefield, South Carolina, as proposed in RM-6826. Petitioner also opposes Ridgely's alternate proposal that Channel 226A be allotted to South Congaree with a 13 kilometer site restriction. In this connection, it states that such a site restriction would result in a "significant deprivation" of service to listeners in the South Congaree area. Finally, petitioner concludes that the Commission should, consistent with past precedent, favor a first local service at South Congaree over Ridgely's request for a site preference.

4. Ridgely disputes petitioner's argument that a grant of the counterproposal would constitute the grant of a transmitter site preference over the provision of a first local service, noting that South Congaree could receive its first local service either from Channel 237A or 226A, with its further site restriction. Ridgely contends that petitioner's actual concern is that the available site area under the counterproposal would not allow the South Congaree station to provide the same signal quality to the larger city of Columbia. However, Ridgely states such secondary coverage considerations have not been recognized as a public interest reason in making allotment decisions. Ridgely also brands as speculative petitioner's statement that Channel 226A, as proposed in the *Notice*, would serve more people than would be possible under the allotments advanced in the counterproposal. It states that petitioner has not indicated the availability of a specific site from which such service could be provided. Further, it notes that the allotment will be available to other applicants who may prefer the sites that could be used with a Channel 237A allotment. Ridgely asserts that the Commission should not base allotment decisions on the site preference of one of several potential applicants, citing *Dunn, North Carolina, et al.*, 4 FCC Rcd 2301 (1989) and *Roland and Heavener, Oklahoma*, 3 FCC Rcd 2684 (1988). Ridgely notes that petitioner has not demonstrated any city grade coverage problems if Channel 237A were allotted to South Congaree. Further, it submits that Channel

237A can be allotted to South Congaree with only an additional 1.1 kilometer (0.7 mile) south-southwest site restriction to that proposed in the *Notice* in light of the Commission's action dismissing on reconsideration a petition to substitute Channel 238A at Wedgefield, South Carolina.[4]

5. Ridgely reiterates that a differential in the secondary coverage area between possible allotments for a community has not been a factor in determining which channel to allot to provide a new service. It states that petitioner is confusing the relevance of this information in proceedings such as this one to those in which the Commission must compare conflicting requests for channel upgrades where such secondary gain areas are important to the outcome. As to this secondary coverage possible under the petitioner's proposal and the counterproposal, Ridgely submits that there is no real difference in either the secondary population served or the quality of signal provided this secondary population, assuming a site restriction which does not need to reflect Channel 238A at Wedgefield. However, in any case, Ridgely argues that this secondary population is already well served, noting that Columbia currently receives a 60 dBu signal from nine FM stations and numerous AM stations, including five AM and FM stations licensed to Columbia. Finally, Ridgely rebuts petitioner's contention that the counterproposal merely reflects a site preference for Station WCEZ(FM).

6. Ridgely reiterates that Station WCEZ(FM)'s presently licensed site is unusable since the incident which caused the tower to collapse could recur because the roadway is used by large trucks. Ridgely states that it would be onerous to require a licensee to rebuild a tower when there is a substantial likelihood of another incident, arguing that no prudent owner would want to rebuild at a transmitter site where there was a risk of recurring loss of service to the listening public.

7. Finally, Ridgely disputes petitioner's statement that there are other less short-spaced sites available for use by Station WCEZ(FM). It states that it investigated the three existing towers identified by the petitioner as negating the short-spacing between the two requests and found that these towers are either loaded to capacity with communications equipment, structurally inadequate for additional antennas, or unavailable for use by Ridgely. Furthermore, Ridgely claims that it had already investigated these possibilities when it was looking to relocate earlier in 1989.

8. We believe that Ridgely has made a sufficiently compelling showing that its choice of transmitter sites is limited to either its currently licensed site or the site specified in its pending application. Further, we find that both petitioner's desire to provide South Congaree with its first local FM service and Ridgely's desire to relocate to downtown Columbia can be accommodated if Channel 237A is allotted to South Congaree with a site restriction of 11.2 kilometers (7.0 miles) southwest and Channel 226A is substituted for Channel 237A at Batesburg, which can be used at the presently licensed site of Station WKWQ.[5] Because Columbia Christian, license of Station WKWQ, has agreed to the modification of its license, issuance of an Order to Show Cause is not necessary. Ridgely will be required to reimburse Columbia Christian for the reasonable costs associated with the change in channel. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). We agree with Ridgely that Channel 226A could be allotted to South Congaree, without requiring a change in the allotment at Batesburg, if a site restriction of 13.0 kilometers (8.1 miles) southwest is imposed. For Class A channels allotted pursuant to the 3 kilowatt power limit in effect prior to October 2, 1989, this distance is at the outer limit where the Commission's city-grade coverage requirements can be assumed, but based on a staff engineering study, we believe that a Channel 226A South Congaree station, site restricted 13.0 kilometers (8.1 miles) southeast, could provide the community with the requisite city-grade signal. However, in light of Columbia Christian's agreement to the modification of its station's license, we believe that the public interest is better served by allotting Channel 237A to South Congaree with its less restrictive site restriction.

9. We also find petitioner's opposition to the allotment of Channel 237A because it requires a site restriction of at least 11.2 kilometers (7.0 miles), as opposed to the allotment of Channel 226A with a site restriction of 7.4 kilometers (4.6 miles), to be without merit. Although petitioner alleges that the proposed allotment of Channel 238A to Wedgefield, South Carolina, greatly restricts the area available for a transmitter, it provides no showing demonstrating that sites are unavailable. Petitioner also claims that the allotment of Channel 237A to South Congaree will cause a curtailment in the provision of service to areas outside the community of license. However, we do not believe that this speculative loss of potential secondary service, especially to areas which are not presently unserved or underserved, to be of sufficient merit to warrant denial of Ridgely's proposal.

10. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Batesburg, South Carolina	226A
South Congaree, South Carolina	237A

11. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Columbia Christian Radio, Inc., for Station WKWQ, IS MODIFIED to specify operation on Channel 226A, in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

12. The window period for filing applications for Channel 237A at South Congaree, South Carolina, will open on **January 29, 1991,** and close on **February 28, 1991.**

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Batesburg has been added to the caption.

[2] Public Notice of the filing of the counterproposal was given on April 20, 1989, Report No. 1776.

[3] The following pleadings were filed after the record closed. Ridgely filed a response to petitioner's and Columbia Christian's reply comments, accompanied by a request for acceptance of the response. Ridgely argues that the petitioner and Columbia Christian have raised new issues in their reply comments which could not reasonably have been anticipated earlier. In addition, Ridgely states that the Commission recently issued a decision which directly relates to one of the issues raised by the petitioner. Petitioner filed an opposition to the acceptance of Ridgely's response. Petitioner states that noting a recent decision in a separate proceeding which relates to one of the issues in this proceeding is insufficient justification for the acceptance of Ridgely's pleading since presumably the Commission is aware of any such recent decision. We believe, however, that the public interest would be served by accepting Ridgely's responsive pleading. It provides information on the availability of alternative transmitter sites in the Columbia area, thus facilitating resolution of the proceeding. Columbia Christian filed Further Reply Comments and a Motion to Accept Further Reply Comments in which it agrees to the substitution of Channel 226A for Channel 237A at Batesburg and the modification of its license for Station WKWQ(FM) to specify the alternate Class A channel. We believe that the public interest would be served by accepting the Further Reply Comments of Columbia Christian since it permits an earlier resolution of the proceeding by obviating the need to issue an Order to Show Cause to Columbia Christian as to why its license for Station WKWQ(FM) should not be modified to specify operation on Channel 226A. Columbia Christian's timely filed reply comments opposing the modification of Station WKWQ(FM)'s license are thus moot and will not be discussed.

[4] *See Chester and Wedgefield, South Carolina*, 4 FCC Rcd 4503, *rev. denied*, 5 FCC Rcd 5572 (1990), *appeal docketed sub nom Chester County Broadcasting Co. v. FCC*, Nos. 90-1496 *et al.* (D.C. Cir. October 19, 1990). The Commission, however, has before it a petition for rule making (RM-6826) jointly filed by Chester County Broadcasting and Davidson Communications seeking the substitution of Channel 238A for Channel 257A at Wedgefield, South Carolina, in order to upgrade Station WDZK at Chester, South Carolina, to Channel 257C3 and Station WWKT at Kingstree, South Carolina, to Channel 257C3.

[5] The coordinates for Channel 237A at South Congaree are 33-50-23 and West Longitude 81-13-18. The coordinates for Channel 226A at Batesburg are North Latitude 33-54-02 and West Longitude 81-24-25. Because the petitions which resulted in these allotments were filed prior to October 2, 1989, applicants for Channel 237A at South Congaree and the licensee of Station WKWQ at Batesburg may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-226

In the Matter of

Amendment of Section 73.202(b), RM-6937
Table of Allotments,
FM Broadcast Stations.
(La Grande, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 19, 1990; Released: December 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. By *Notice of Proposed Rule Making*, 4 FCC Rcd 4904 (1989), the Commission, on its own motion, proposed the substitution of Channel 261C3 for Channel 261A at La Grande, Oregon, and the modification of the license of Grande Ronde Broadcasting, Inc. ("Grande Ronde"), for Station KWRL(FM) to specify operation on the higher powered channel. Grande Ronde filed a counterproposal requesting the allotment of Channel 260C1 instead of Channel 261C3 to La Grande and the modification of its license accordingly.[1] No other comments were received.

2. We believe the public interest would be served by substituting Channel 260C1 for Channel 261A at La Grande, Oregon, since it could provide the community with an additional wide coverage area FM service. Channel 260C1 can be allotted to La Grande in compliance with the Commission's minimum distance separation requirements and can be used at Station KWRL(FM)'s licensed transmitter site.[2] As proposed, we will also modify Grande Ronde's license for Station KWRL(FM) to specify operation on Channel 260C1 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
La Grande, Oregon	254C2, 260C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Grande Ronde Broadcasting, Inc., for Station KWRL(FM), La Grande, Oregon, IS MODIFIED to specify operation on Channel 260C1, in lieu of Channel 261A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the filing of the counterproposal was given on August 18, 1989, Report No. 1791.

[2] The coordinates for Channel 260C1 at La Grande are North Latitude 45-20-54 and West Longitude 118-07-04. Since the petition which resulted in this allotment was filed prior to October 2, 1989, Grande Ronde may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-431

In re Applications of

TALLAHASSEE MINORITY PARTNERS (hereafter "Minority")	File No. BPH-880324MH
FERGUSON COMMUNICATIONS, INC. (hereafter "Ferguson")	File No. BPH-880324MN
DOLPHIN COMMUNICATIONS, LTD. (hereafter "Dolphin")	File No. BPH-880324MR
CAPITAL CITY BROADCAST, INC. (hereafter "Capital")	File No. BPH-880324MW
MOORHEAD/ KIEDROWSKI, LTD. (hereafter "Moorhead")	File No. BPH-880324NE
MARANTHA BROADCASTING COMPANY, INC. (hereafter "Marantha")	File No. BPH-880324NG
WCVC, INC. (hereafter "WCVC")	File No. BPH-880324NI
TALLY RADIO, INC. (hereafter "Tally")	File No. BPH-880324NL
WOMEN'S BROADCASTING CORP. (hereafter "WBC")	File No. BPH-880324NQ
KENNETH B. DARBY (hereafter "Darby")	File No. BPH-880324NX
METRO TALLAHASSEE BROADCASTERS LIMITED PARTNERSHIP (hereafter "Metro")	File No. BPH-880324OA
QUAD COMMUNICATIONS, INC. (hereafter "Quad")	File No. BPH-880324OD
JOHN S. MATTHEWS, JR. (hereafter "Matthews")	File No. BPH-880324OH
J.L.J.B. WIRELESS, INC. (hereafter " Wireless")	File No. BPH-880324OL

For Construction Permit
for a New FM Station on Channel 291A (106.1 MHz)
in Tallahassee, Florida

ERRATUM

Released: December 13, 1990

By the Chief, Audio Services Division:

The Hearing Designation Order in MM Docket 90-431 contains an error in Paragraph 18, Issue No. 5. The issue is corrected to read as follows:

5. To determine whether there is a reasonable possibility that the tower height and location proposed by each of the following applicants would constitute a hazard to air navigation.

APPLICANTS
Dolphin
Capital
Moorhead
WBC
Metro
Matthews
Wireless
Quad
WCVC

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

NORRIS SATELLITE COMMUNICATIONS, INC. — File Nos. 54-DSS-P/L-90, 55-DSS-P-90

Application for Authority to Construct, Launch and Operate Communications Satellites in the Ka-Band

In the Matter of the Petition of

NORRIS SATELLITE COMMUNICATIONS, INC. — RM No. 7511

For Amendment of Parts 2 and 25 of the Commission's Rules to Establish a General Satellite Service in the Ka-Band

ORDER

Adopted: December 3, 1990; Released: December 13, 1990

By the Chief, Domestic Facilities Division and Chief, Spectrum Engineering Division:

1. Norris Satellite Communications, Inc. (Norris) has filed a motion seeking extensions of the remaining pleading dates in the above-captioned proceedings. Currently, the date for filing replies to comments filed in both the frequency allocation Rule Making proceeding and the application proceeding is December 3, 1990; the date for filing responses in the application proceeding is December 28, 1990. Norris requests that these dates be extended to January 7, 1991 and January 21, 1991, respectively. It states that additional time is needed to perform technical analyses in response to the petition to deny filed by GTE Spacenet Corporation and because of the upcoming holidays. Norris states that GTE Spacenet's counsel has no objections to Norris's request.

2. For good cause shown, Norris's motion for additional time is granted. Therefore, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. §0.291, the date for filing replies is extended to **January 7, 1991.** Further, the date for filing responses in the application proceeding is extended to **January 21, 1991.**

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Will McGibbon
Chief, Spectrum Engineering Division
Office of Engineering and Technology

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-320

In the Matter of

Annual 1990 Access Tariff Filings

MEMORANDUM OPINION AND ORDER

Adopted: November 29, 1990; Released: December 13, 1990

By the Commission:

I. BACKGROUND

1. In the *1990 Access Tariff Order*,[1] the Common Carrier Bureau found that Central Telephone Company-Nevada (Centel) had filed DS1 rates that were more than eight times its rates for voice grade special access service and thus were outside the presumptive range of reasonableness established in our investigation of strategic pricing of special access.[2] The Bureau therefore suspended Centel's DS1 rates for five months and initiated an investigation of the lawfulness of those rates. The Bureau noted that prior Commission Orders do not foreclose Centel from demonstrating that rates outside the crossover range will be reasonable. Rather, the Bureau found that Centel had failed to make such a demonstration in its tariff support material or subsequent pleadings. Therefore, the Bureau directed Centel to demonstrate that its filed DS1 recurring rates are lawful under the standards enunciated in the *Strategic Pricing Order* and *Strategic Pricing Reconsideration*. [3]

II. PLEADINGS

2. On July 16, 1990, Centel filed its direct case in this investigation. American Telephone and Telegraph Company (AT&T) and MCI Telecommunications Corporation (MCI) filed oppositions to Centel's direct case; Centel filed a reply.

3. In its direct case Centel describes the development of its DS1 rates. Centel explains that it developed its total special access revenue requirement on the basis of projected test year costs and allocated this revenue requirement among special access subelements. Centel states that it allocated costs associated with customer premises wire, outside plant loop central office, outside plant loop, and information originating/terminating to the Channel Termination revenue requirement. Centel explains that it used a computerized revenue development program to develop the revenue requirement separately for DS1 and other High Capacity (HiCap) services and for Digital Data Service (DDS). Centel then subtracted these HiCap and DDS revenue requirements from the total Channel Termination revenue requirement and allocated the remainder among other special access services that are not at issue in this investigation. Centel states that it used the same process to develop Channel Mileage Termination and Channel Mileage Facility rates for each special access service on the basis of transport and transport termination costs. Centel Direct Case at 3-5.

4. Centel disavows any intent to price DS1 service strategically and states further that it did not attempt to establish crossover relationships between services. Rather, Centel claims, its DS1 rates are based on the relevant costs of that service and the crossover relationship is thus irrelevant. Centel concludes that its suspended DS1 rates are lawful and should be permitted to become effective. *Id.* at 5-6.

5. AT&T argues that Centel has failed to demonstrate that the rates subject to investigation are reasonably designed to reflect Centel's costs of providing DS1 service. According to AT&T, Centel's direct case is no more successful than its earlier pleadings in rebutting the presumption that its proposed rates are not cost-based. AT&T Opposition at 1-2. AT&T argues that Centel's direct case does not provide the "persuasive justification" required to demonstrate that its rates are cost-based. For example, AT&T contends, Centel does not say whether it directly assigns any costs within each rate element to high capacity access or, if so, which costs are directly assigned. *Id.* at 4.

6. MCI also contends that Centel has provided no new information regarding its DS1 costs beyond that which the Bureau has already found inadequate. MCI argues that this failure to provide new information alone would justify finding Centel's rates unlawful. MCI Opposition at 3. Centel does not explain why its filed DS1 rates are outside the crossover range, MCI states. MCI observes that Centel provides total revenue requirements from its original transmittal but does not attempt to disaggregate these data into component unit costs. For example, MCI states, Centel fails to discuss why the costs for Centel-Nevada result in crossover points that are significantly higher than for other Centel jurisdictions. MCI concludes that, because Centel has not provided data on which a lawful DS1 rate can be determined, the Commission should require Centel to reduce its DS1 rates to six times its voice grade rates -- the midpoint of the presumptive range of reasonableness. *Id.* at 4-5.

7. In reply, Centel asserts that it has provided sufficiently disaggregated data to demonstrate that its rates are cost-based. Centel's reply includes exhibits using data that it included in earlier filings which, Centel argues, demonstrate that its rates are based on its cost of providing the service. Accordingly, Centel concludes, its rates are lawful. Centel Reply at 3-5.

III. DISCUSSION

8. The presumptive range of reasonableness for DS1 rates was "designed to serve as a tool to aid us in identifying rates that warrant investigation." *Strategic Pricing Reconsideration*, 5 FCC Rcd at 408. A carrier can demonstrate that rates outside the crossover range are lawful if they reasonably reflect the carrier's costs. Further, in any tariff investigation pursuant to Section 204(a) of the Act, a carrier bears the burden of justifying its rate increase.

9. The Bureau found in the *1990 Access Tariff Order* that Centel's DS1 rates fell outside the presumptive range of reasonableness and that Centel had not demonstrated adequately that the rates are reasonable. Neither in its direct case nor in its reply has Centel provided further

information that demonstrates that the suspended rates are lawful because they reasonably reflect Centel's costs. Centel's description of its ratemaking methodology is sketchy. For example, Centel does not explain what costs, if any, are directly assigned within each rate element. Centel asserts that it used a computer model to develop its rates. Centel has not, however, provided any explanation of the computer model and the method by which that model assigns investment and expense among special access rate elements. Moreover, although Centel provides what it describes as disaggregated cost data, Centel concedes that these are the same data that it provided with its original filing. We agree with the Bureau's conclusion that these data were insufficient to demonstrate that its rates were reasonably based upon its costs. Centel has not availed itself of the opportunity to demonstrate that its rates are cost-based, and in fact has provided no additional justification for its rates. Under these circumstances, we conclude that Centel has failed to meet its burden of demonstrating that the suspended increase in DS1 rates is lawful and we are forced to find that Centel's suspended DS1 rates are unlawful.[4]

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, pursuant to Sections 201(b) and 204(a) of the Communications Act, 47 U.S.C. §§ 201(b), 204(a), the recurring rates for DS1 service of Centel (Nevada) designated for investigation in this docket ARE UNJUST AND UNREASONABLE.

11. IT IS FURTHER ORDERED that Central Telephone Company-Nevada SHALL ISSUE revisions to its tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

12. IT IS FURTHER ORDERED that Special Permission No. 90-1257 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived for the purpose of issuing the above revisions.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Annual 1990 Access Tariff Filings, CC Docket No. 90-320, 5 FCC Rcd 4177 (Com.Car.Bur. 1990) (*1990Access Tariff Order), app. for review pending.*

[2] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order*); Order on Reconsideration, 5 FCC Rcd 400 (1989) (*Strategic Pricing Reconsideration*).

[3] *1990 Access Tariff Order,* 5 FCC Rcd at 4231.

[4] *See* 47 U.S.C. § 204(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-411

In the Matter of

Amendment of Section 73.202(b), RM-7238
Table of Allotments,
FM Broadcast Stations.
(Birch Tree, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 30, 1990; Released: December 14, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5536 (1990), issued in response to a petition filed by Jack G. Hunt (petitioner) proposing the substitution of FM Channel 296C3 for Channel 296A at Birch Tree, Missouri. Petitioner also requested modification of his license for Station KBMV-FM, Channel 296A, to specify operation on Channel 296C3. Petitioner filed supporting comments in which he reaffirmed his interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 296C3 for Channel 296A at Birch Tree, Missouri, since it could provide the community with a wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the site specified by the petitioner, 8.5 kilometers (5.3 miles) northwest of the community.[1] In addition, we will modify the license for Station KBMV-FM, Birch Tree, to specify operation on Channel 296C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Birch Tree, Missouri	296C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license for Station KBMV-FM, Birch Tree, Missouri, IS MODIFIED to specify operation on Channel 296C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 296C3 are 37-03-26 and 91-32-33.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-407

In the Matter of

Amendment of Section 73.202(b), RM-7333
Table of Allotments,
FM Broadcast Stations.
(Traverse City, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 30, 1990; Released: December 14, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5507 (1990), issued in response to a petition filed by Contemporary Communications (petitioner). The *Notice* proposed the allotment of Channel 283A to Traverse City, Michigan, as that community's fourth FM broadcast service. Petitioner filed comments in support of the *Notice* and stated its intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 283A at Traverse City, Michigan, since it could provide the community with its fourth FM broadcast service. Channel 283A can be allotted to Traverse City in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules provided there is a site restriction 3.2 kilometers (2 miles) northwest of the community.[1] The site restriction will avoid a conflict with Station WSNX-FM, Channel 283B, Muskegon, Michigan. Since Traverse City is located within 320 kilometers (200 miles) of the U.S.- Canadian border, concurrence of the Canadian government has been obtained.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Traverse City, Michigan	270C1, 278C 283A, 298C2

4. The window period for filing applications for Channel 283A at Traverse City, Michigan will open on **January 29, 1991,** and close on **February 27, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 283A are 44-46-59 and 85-39-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-609

In the Matter of

Amendment of Section 73.202(b),	RM-7542
Table of Allotments,	
FM Broadcast Stations.	
(Nephi, Utah)	

NOTICE OF PROPOSED RULE MAKING

Adopted: November 30, 1990; Released: December 14, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Charles D. Hall (petitioner), permittee of Station KCDH(FM), Channel 224A, Nephi, Utah, requesting substitution of Channel 280C for Channel 224A at Nephi and modification of his construction permit to specify operation on the higher class channel. Petitioner states that he will apply for the channel, if allotted.

2. Petitioner notes that his proposal constitutes a request for a non-adjacent channel substitution. He claims that in the event that additional expressions of interest are filed for Channel 280C, Channel 260C can be allotted to Nephi to accommodate those interests.

3. We believe the public interest would be served by proposing the substitution of Channel 280C for Channel 224A at Nephi, Utah, since it would provide Nephi with an expanded coverage area FM service. A Commission engineering analysis shows that Channel 280C can be allotted to Nephi without a site restriction in compliance with the Commission's minimum distance separation requirements.[1] As requested, we shall also propose to modify petitioner's construction permit for Station KCDH(FM) to specify operation on Channel 280C in accordance with Section 1.420 of the Commission's Rules. In the event that additional expressions of interest are filed, Channel 260C can be allotted to Nephi with a site restriction of 17.5 kilometers (10.9 miles) west of the community to avoid short spacings to Stations KLVV, Channel 258C, Bountiful, Utah, and KEKB, Channel 260C, Fruita, Colorado.[2]

4. Accordingly, for the reasons stated above, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Nephi, Utah	224A	280C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 4, 1991,** and reply comments on or before **February 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Harry C. Martin, Esquire
Troy F. Tanner, Esquire
Reddy, Begley & Martin
2033 M Street, N.W.
Washington, D. C. 20036
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for this allotment are North Latitude 39-42-36 and West Longitude 111-50-00. Petitioner proposed a site restriction of 16.1 kilometers (10 miles) southwest of Nephi to avoid a short spacing to the proposed allotment of Channel 280C3 at Smithfield, Utah. This proposal has been dismissed. *See Report and Order* in MM Docket No. 89-134, 5 FCC Rcd 958 (1990).

[2] The coordinates for this allotment are North Latitude 39-39-53 and West Longitude 112-01-44.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-613

In the Matter of

Amendment of Section 73.202(b), RM-7559
Table of Allotments,
FM Broadcast Stations.
(Britt, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1990; Released: December 14, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Hancock County Radio (petitioner) requesting the allotment of Channel 258A to Britt, Iowa, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 258A to Britt, Iowa, since an interest has been expressed in providing the community with its first local FM service. Channel 258A can be allotted to Britt in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.3 kilometers (4.5 miles) west to avoid short-spacings to the construction permit for a new station on Channel 258A at Eldora, Iowa, and to Station WLOL, Channel 258C, Minneapolis, Minnesota.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Britt, Iowa	--	258A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 4, 1991,** and reply comments on or before **February 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Allan G. Moskowitz, Esq.
Kaye, Scholer, Fierman, Hays & Handler
901 - 15th Street, N.W., Suite 1100
Washington, D.C. 20005
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 258A at Britt are North Latitude 43-06-04 and West Longitude 93-53-27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-612

In the Matter of

Amendment of Section 73.202(b), RM-7550
Table of Allotments,
FM Broadcast Stations.
(Fox Farm, Wyoming)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1990; Released: December 14, 1990

By the Assistant Chief, Policy and Rules Division:

1. A petition for rule making has been filed on behalf of Farm Broadcasting (petitioner) seeking the allotment of FM Channel 280C1 to Fox Farm, Wyoming, as that community's first local FM broadcast service.[1] Petitioner stated its intention to apply for the channel if allotted.

2. A staff engineering review has determined that Channel 280C1 can be allotted to Fox Farm consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited at least 9.7 kilometers (6.1 miles) east[2] of the community to avoid short-spacing to Station KFMU(FM), Channel 280A, Oak Creek, Colorado. [3]

3. We believe the public interest would be served by proposing the allotment of Channel 280C1 to Fox Farm, Wyoming, since it would provide a first local FM broadcast service to the community. Therefore, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Fox Farm, as follows:

	Channel No.	
City	Present	Proposed
Fox Farm, Wyoming	–	280C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 4, 1991,** and reply comments on or before **February 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Daniel F. Van Horn, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Station KSHY(AM), presently licensed at Cheyenne, has an outstanding construction permit (File No. BP-850118AC) to operate full time at Fox Farm.

[2] Coordinates used for Channel 280C1 at Fox Farm are 41-05-45 and 104-41-13.

[3] Coordinates at the licensed site of Station KFMU(FM) are 40-14-10 and 106-52-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-332

In the Matter of

Amendment of Section 73.202(b),	RM-6720
Table of Allotments,	RM-7156
FM Broadcast Stations.	
(Defuniak Springs and Freeport, Florida[1])	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 30, 1990; Released: December 14, 1990

By the Assistant Chief, Policy and Rules Division:

1. Pursuant to the request of Defuniak Communications, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 6006 (1989), proposing the substitution of Channel 276C2 for Channel 276A at Defuniak Springs, Florida, and modification of its license for Station WQUH(FM) to specify operation on the higher class channel. In response to the *Notice*, petitioner filed comments restating its intention to apply for the channel if allotted, and a further proposal seeking to change the community of license from Defuniak Springs to Freeport, Florida.[2] Kudzu Broadcasting Partnership ("Kudzu"), successor in interest to petitioner and assignee of Station WQUH(FM), filed a motion to bifurcate the upgrade and change of community of license proposals in order to expedite this proceeding.[3]

2. After the close of the pleading cycle, Kudzu filed a request to withdraw its proposal to change the community of license of Station WQUH(FM) from Defuniak Springs to Freeport.[4] Kudzu reaffirms its interest in its original proposal to substitute Channel 276C2 for Channel 276A at Defuniak Springs. In light of Kudzu's request, we will dismiss its request to modify the community of license of Station WQUH(FM).[5]

3. We believe the public interest would be served by substituting Channel 276C2 for Channel 276A at Defuniak Springs, Florida, since it would provide the community with an expanded service area FM channel. Channel 276C2 can be substituted for Channel 276A at Defuniak Springs in compliance with the Commission's minimum spacing requirements with a site restriction 8.2 kilometers (5.1 miles) west of the city.[6] The site restriction is necessary in order to avoid short spacings to the licensed site of Station WSYA(FM), Channel 277C, Montgomery, Alabama, and a proposal to substitute Channel 276C2 for Channel 276A at Tallahassee, Florida. In accordance with Section 1.420(g) of the Commission's Rules, we will modify the license of Station WQUH(FM) to specify operation on Channel 276C2.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Defuniak Springs, Florida	276C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WQUH(FM), Defuniak Springs, Florida IS MODIFIED, to specify operation on Channel 276C2 in lieu of Channel 267A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the counterproposal filed by Defuniak Communications, Inc. (RM-7156) IS DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Freeport has been added to the caption.

[2] The request to change community of license was treated as a counter-proposal. *See* Public Notice, November 3, 1989, Report No. 1800 (RM-7156).

[3] Dolcom Broadcasting, Inc. ("Dolcom"), licensee of Station WTHZ(FM), Channel 276A, Tallahassee, Florida, filed a contingent petition to consolidate this proceeding with MM Docket No. 90-211, in which Dolcom requested the substitution of Channel 276C2 for Channel 276A at Tallahassee and the modi-

fication of its authorization for Station WTHZ(FM) accordingly. *See Notice of Proposed Rule Making* (MM Docket No. 90-211), 5 FCC Rcd 2671 (1990). Dolcom notes that Kudzu filed a counterproposal in that docket requesting the substitution of Channel 276C1 for Channel 276A in either Defuniak Springs or Freeport. While Dolcom admits that there is no conflict between its proposal and the Class C2 substitution proposed in this proceeding, Dolcom requests that this proceeding be consolidated with MM Docket No. 90-211. Kudzu filed an objection to Dolcom's consolidation request and Dolcom filed a reply. On September 24, 1990, Dolcom withdrew its consolidation request, noting that Kudzu withdrew its counterproposal filed in MM Docket No. 90-211.

[4] Pursuant to Commission Rule 1.420(j), Kudzu subsequently submitted an affidavit that it received no consideration for the withdrawal.

[5] Accordingly, Kudzu's motion to bifurcate this proceeding is moot.

[6] The coordinates for Channel 276C2 at Defuniak Springs are North Latitude 30-42-27 and West Longitude 86-11-48. Since this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Silver King Broadcasting of Vineland, Inc. For Renewal of License of WHSP-TV Vineland, NJ — BRCT-890130KH

and

Silver King Broadcasting of New Jersey, Inc. For Renewal of License of WHSE-TV Newark, NJ — BRCT-890119KG

MEMORANDUM OPINION AND ORDER

Adopted: December 7, 1990; Released: December 14, 1990

By the Chief, Video Services Division

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it: (1) the license renewal application of commercial television station WHSP-TV, Channel 65, Vineland, New Jersey, filed by Silver King Broadcasting of Vineland, Inc. ("WHSP-TV"); (2) the license renewal application of commercial television station WHSE-TV, Channel 68, Newark, New Jersey, filed by Silver King Broadcasting of New Jersey, Inc. ("WHSE-TV");[1] (3) a Petition to Deny and Supplement filed by the Media Access Project on behalf of joint petitioners Office of Communication of the United Church of Christ, Action for Children's Television, Professor Robert Lewis Shayon ("Shayon"), Professor Jorge Reina Schement, and Professor Jordan Young (hereinafter collectively referred to as "petitioners") against the aforementioned renewal applications; (4) a joint opposition filed by the licensees (hereinafter referred to as Silver King); (5) the petitioners' reply; and (6) various other pleadings.[2]

BACKGROUND

2. On December 22, 1986, the Commission granted an application to assign the license for station WHSP-TV (formerly WSJT-TV), Vineland, New Jersey from Press Broadcasting Company to Silver King Broadcasting of Vineland, Inc. (Silver King). *Silver King Broadcasting of Vineland, Inc.*, 2 FCC Rcd 324 (1986) (*By Direction Letter*). The parent of Silver King, Home Shopping Network, Inc. owns WHSE-TV (formerly WWHT(TV)) Newark, New Jersey, through another subsidiary. The Commission waived Section 73.3555(a)(3) of the Rules, commonly referred to as the "duopoly" rule in conjunction with its approval of the assignment of WHSP-TV.[3]

3. Subsequently, the Commission considered a petition for reconsideration of that action, filed on behalf of substantially the same parties and raising essentially the same arguments against WHSP-TV's programming and against waiver of the duopoly rule as are raised here. Specifically, it presented evidence based upon a monitoring of WHSP-TV's actual programming subsequent to the grant of the assignment to WHSP-TV that almost none of WHSP-TV's programming covered local issues, and that none of its programming was designed to meet the needs of children.[4] In further challenging the Commission's waiver of the duopoly rule, the petition alleged that the programming statement in Silver King's assignment application was too brief and generalized to provide a basis upon which to evaluate the benefits and detriments of a grant of the waiver request.

4. The Commission denied the petition for reconsideration because petitioners failed to present their evidence in a timely manner and further, the evidence compiled by petitioners was not relevant in that it concerned events occurring subsequent to the challenged decision rather than on information before the Commission at the time of consideration of the assignment application. *Silver King Broadcasting of Vineland, Inc.*, 3 FCC Rcd. 6640, 6641 (1988)(*Reconsideration*). The Commission also found that in challenging its grant of the waiver request, petitioners ignored the factors that the Commission relies on in balancing the benefits and detriments of a waiver of the duopoly rule and affirmed the staff's conclusions based on an analysis of those various factors. *Id.* The D.C. Circuit Court of Appeals subsequently affirmed the Commission's decisions. *Office of Communication of the United Church of Christ v. FCC*, No. 87-1243 (D.C. Cir. August 24, 1990).

5. Petitioners now argue that WHSP-TV and WHSE-TV, commonly-owned by Silver King, have failed to show that their programming serves the needs of their communities of license, and specifically the needs of children. They contend that without such a showing the Commission cannot find the grant of the renewal applications are in the public interest. Petitioners also incorporate by reference the petition for reconsideration they filed against WHSP-TV's earlier assignment application, stating that it is relevant to the current applications for renewal. The petition for reconsideration reported the conclusions of its monitoring of WHSP-TV's programming practices initiated subsequent to the consummation of the sale of WHSP-TV on or about December 30, 1986, and continuing several weeks thereafter during WHSP-TV's present renewal term.[5] Petitioners concluded that WHSP's programming consisted of fewer than half a dozen interview segments, roughly 45 seconds in length alluding to two state-wide issues, which were then repeated day after day, without change. The petitioners alleged that in a typical day, WHSP appears to carry four or five of these segments, which are repeated about three times each, for a total of no more than 15 to 16 minutes per day. These conclusions are further supported by Professor Shayon and Leon Lazarus, who stated they were generally familiar with WHSP-TV's programming based on brief periods of viewing over a short period of time. Petitioners note further that, with respect to the persons interviewed by WHSP-TV, none appeared to be identifiable experts, advocates, minorities or public officials. Petitioners also state

that while WHSP-TV repeats several community announcements in video each day, which are truly local, as well as public service announcements (PSA's), none of this programming is issue responsive. Thus, petitioners assert that, with the exeption of a block of about two hours of religious programming on Sunday morning, the remainder of WHSP-TV's program schedule consists almost entirely of satellite-delivered home shopping programming.

6. In addition to the allegations set forth in the previously filed petition for reconsideration regarding WHSP-TV, petitioners state that WHSE-TV's programming also consists almost entirely of a home shopping format; that the small amount of nonduplicated programming the two stations carry relates largely to state-wide issues; and that none of its programming is designed to meet the special needs of children.

7. Next, petitioners state that the applicants have failed to demonstrate that their continued operation of the stations having overlapping Grade B contours is in the public interest. In this regard, petitioners incorporate their previous argument that WHSP-TV's assignment application was too brief to provide a basis for evaluating the benefits represented by its proposal. They also note that the nearly identical programming of both stations similarly undermines one of the major impetuses behind the duopoly rule: to increase service in underserved areas. In addition, in their supplement to the petition to deny, petitioners submit documentation in support of their allegation that there is nothing in the record to show that the financial health of both stations is contingent on their continued joint operation pursuant to the duopoly waiver.[6]

8. The licensee responds first that the Commission's grant of its waiver request was unconditional and was based upon a number of compelling factors, including the relatively small size and population of the overlap area; the large number of competing broadcast services in that area; the independent identities of the markets served by the stations; the stations' past financial history; and the stations' programming. Thus, the licensee argues that petitioners have presented no new facts which warrant a change in the waiver decision. The purchase agreements for the 1984 and 1986 sales of WHSP-TV, Silver King argues, was before the Commission when it granted the waiver in question. The licensee also notes that there is no factual or legal basis to suggest that a difference in station purchase prices precludes, or is relevant to, grant of a duopoly waiver where previous station losses are undisputed. The licensee further states that there is no Commission precedent to the effect that once granted an unconditional waiver, the licensee must rejustify the waiver with each license renewal application.

9. Next, Silver King responds to petitioners' programming challenge stating first that it is not required to include programming information in its renewal application. Further, Silver King states that the nonnetwork programming that WHSE-TV and WHSP-TV carry is all nonentertainment, public affairs, informational and children's programming, the substantial majority of which is locally produced. This programming, Silver King states, represents approximately 10.2% of the stations' operating schedules from 6 a.m. to midnight, and is in excess of the Commission's former programming guidelines. Silver King also notes that virtually none of the station's local programming is duplicated. Silver King notes that the stations each air a public affairs program entitled "In Your Interest," which is broadcast for four to four and one-half minutes each hour, 24 hours a day, except on Sunday mornings, when each station presents religious programming and one hour of educational and informational children's programming. Thus, Silver King argues that petitioners have failed to raise specific and factual allegations which, if true, would establish that the overall programming at either station could not reasonably have met the needs and interests of its community.

DISCUSSION

10. In assessing the merits of a petition to deny, a two-step analysis is required under Section 309(d)(1) and (2) of the Act, as reiterated in *Astroline Communications Co. v. F.C.C.*, 857 F.2d 1556 (D.C. Cir. 1988). The first test is whether the petitioner has demonstrated by specific allegations of fact that grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity. If so, then the second test is whether the entire record before us still shows that there is a substantial and material question of fact to warrant further inquiry. We note further that if the facts are not disputed, but disposition turns on inferences to be drawn from facts already known and the legal conclusions to be drawn from the facts, a hearing is unnecessary. *Stone v. FCC*, 466 F.2d 316, 323 (D.C. Cir. 1972).

11. *Issue Responsive Programming*. With respect to the licensees' general issue responsive programming obligations, we have eliminated previous guidelines that television licensees provide specified quantities of certain types of nonentertainment programming. *See Commercial TV Stations*, 98 FCC 2d 1076, 1090-92 (1984). Specifically, "arguments based solely on the failure to present amounts of nonentertainment programming will not be appropriate." *Id.* at 1093. Instead, a petitioner is required to demonstrate that the station failed to address issues facing the community in its programming. *Id.* Further, we have granted licensees broad discretion to choose, in good faith, which issues are of concern to the community and to choose the best way to address those issues. The Commission will not interfere with the broadcaster's judgment without a showing that the broadcaster was unreasonable in its selection of issues *Commercial TV Stations*, 98 FCC 2d at 1092-94; *Office of Communication of the United Church of Christ v. F.C.C.*, 707 F.2d 1414, 1431 (D.C. Cir. 1983).

12. We find that petitioners have failed to make a *prima facie* case regarding the licensees' issue responsive programming obligations at WHSP-TV and WHSE-TV. First, it appears that the only analysis undertaken by petitioners of the licensees' programming was limited to monitoring WHSP-TV's programming for a short period of time ("several weeks") subsequent to its acquisition by the present licensee in December of 1986.[7] Indeed, the declarations of Shayon and Lazarus, submitted with the earlier petition for reconsideration, indicated only a general familiarity with WHSP-TV's programming for only a brief period of time during the license term. They also failed to identify any issue on WHSP-TV's Issues/Programs lists that was not addressed in its overall programming. With respect to WHSE-TV's programming, it does not appear that a similar monitoring took place, nor have petitioners submitted any other support for their allegations against the licensee of WHSE-TV. Second, petitioners allege that

each station's programming is based almost entirely on a home shopping format, that each station's programming is largely duplicative of the other's programming, and that the stations' nonduplicated programming addresses primarily state-wide issues. We find that even if these allegations were true, petitioners have failed to state how such programming would amount to an abuse of the licensees' programming discretion. Home shopping formats are not *per se* a violation of a licensee's programming discretion. Moreover, nonlocal programs can respond to local needs. *Malrite of New York, Inc.*, 71 FCC 2d 241 (1979). The record demonstrates that both stations have responded to local needs and that almost none of either station's local programming is duplicated by the other station. Thus, the petition and attached declarations fail to make a *prima facie* case regarding each station's issue responsive programming performance.

13. Moreover, we find there are no substantial and material questions regarding the licensees' issue responsive programming. The licensees point out that each station produces and presents a local public affairs program entitled "In Your Interest," which deals with a wide variety of local, state and national issues through reports and interviews with experts and newsmakers. The program, "In Your Interest," has addressed such topics as racial discrimination, Vineland police and firefighter retirement proposals, New Jersey top legislative issues, the federal anti-smoking bill, school funding in Vineland, and an interview with Newark Mayor Sharpe James, to name a few. Silver King also notes that both stations have carried a variety of religious programming as well.

14. *Children's Programming.* While there is a continuing duty on each licensee to examine and address the program needs of children, there is no mandatory quota for children's programming. *TV Programming for Children*, 96 FCC 2d 634, 656 (1984). Thus, petitioners have a heavy burden to show that the licensees have abused their discretion. *Commercial TV*, 98 FCC 2d at 1093-94. In this regard, we believe that petitioners fail to raise a *prima facie* case that the stations provided no children's programming because they merely assert, without more, that none of the stations' programming is designed to meet the special needs of children. Further, Silver King asserts that both stations air one hour of educational and informational children's programming each Sunday morning, including "Bean Sprouts," a program about Chinese-American children and their friends; "Gettin' to Know Me," a program on black folklore, designed to ensure that Black American children remember their African beginnings; and "Vegetable Soup," designed to help counter the negative effects of prejudice and racial isolation.

15. *Renewal Application Programming Statements.* With respect to petitioners' argument that the renewal applications of both stations fail to contain representations that their programming meets the special needs of children or other information concerning programming, we agree with Silver King that there are no such requirements that programming information be included in renewal applications.[8] We note further, and petitioners do not dispute, that the licensee has met its public file requirements, thus setting forth in its Issues/Programs lists all of the required information concerning its programming and in addition, has submitted this information for the record herein.

16. *Waiver of the Multiple Ownership Rules.* With regard to the correctness of our previous decision to grant Silver King a waiver of the multiple ownership rules, we find that the grant was unconditional and permanent. The fact that the waiver has served its purpose cannot be the basis for rescinding the previous action. Indeed, one of the purposes of the waiver was to maintain an economically viable outlet in Vineland. Therefore we will not reevaluate it in the renewal context. Moreover, this issue was also the subject of decision in the District of Columbia Court of Appeals, wherein it was held that "the Commission reasonably concluded that the balance of interests tipped in favor of granting Silver King's request for a waiver." *Office of Communication of the United Church of Christ v. FCC*, No. 88-1243, slip op. at 17.

17. Accordingly, based on the foregoing, we find that the petitioners have failed to establish a *prima facie* case or to raise a substantial and material question of fact requiring resolution in a hearing. We further find that applicants herein are fully qualified and grant of their renewal applications serves the public interest, convenience and necessity.

18. IT IS ORDERED that the joint petition filed by the Media Access Project on behalf of the Office of Communications of the United Church of Christ, Action for Children's Television, Professors Robert Lewis Shayon, Jorge Reina Schement and Jordan Young IS DENIED.

19. IT IS FURTHER ORDERED, That the license renewal application for Station WHSP-TV IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

FOOTNOTES

[1] We note that a competing application was filed against this renewal application by Arthur Liu for a construction permit to operate a commercial television station on Channel 68 in Newark, New Jersey. By separate order we have designated those applications for hearing on the issues specified therein.

[2] The licensees challenge the standing of the petitioners on the grounds that 1) the affidavits submitted by petitioners are deficient and 2) that their petition is untimely with respect to its challenge of the stations' common ownership because that issue has been previously resolved by the Commission in a separate proceeding. First, an organization may establish standing if it provides an affidavit from members entitled to standing in their own right, and those persons indicate that the group represents local residents. *NAB Petition for Rule Making*, 82 F.C.C. 2d 89, 98-99 (1980). One of the petitioners has provided an affidavit claiming that he is a resident and viewer of WHSE-TV in Newark, New Jersey, one petitioner has provided an affidavit claiming he is a resident of the service area of WHSP-TV in Vineland, New Jersey, and one petitioner's affidavit claims he is a resident of the service area of both stations. The joint petition will, therefore, be considered on its merits.

[3] The duopoly rule prohibits common ownership or control of television stations whose Grade B contours overlap. 47 C.F.R. Section 73.3555(a)(3). The signals of WHSP-TV and WHSE-TV

share a Grade B contour overlap area of 613 square miles, which encompasses 9.8% of WHSP's Grade B area and 5.7% of that area's population, and which encompasses 10.4% of WHSE-TV's Grade B area and 2.2% of that area's population.

[4] Because WHSE-TV was not a party to the assignment application, petitioners did not present evidence concerning WHSE-TV's programming.

[5] The exact period of time WHSP-TV's programming was monitored was not specifically stated in the petition for reconsideration. It is also unclear which days, and which hours during those days, the petitioners monitored WHSP-TV.

[6] In support of this allegation, petitioners submit documentation pertaining to two prior successive sales of WHSP-TV showing that WHSP-TV was purchased by Silver King's predecessor, Asbury Park Press, Inc., for $3,000,000 but that Silver King purchased the station from Asbury Park Press for $23,000,000. Petitioners argue that in its *By Direction Letter* and *Reconsideration*, the Commission failed to take into account the fact that while the former licensee operated at a loss of some $6,000,000 during its tenure, it experienced a gain of some $20,000,000 from the subsequent sale of the station.

[7] This analysis was submitted with the petition for reconsideration of the grant of the above-noted assignment application and is incorporated by reference with the petition to deny presently being considered.

[8] *See Office of Communication of the United Church of Christ v. FCC*, No. 87-1243, slip op. at 11-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Catskills RSA Limited Partnership — File No. 10826-CL-P-563-B-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B in Market No. 563, New York 5 - Otsego

ERRATUM

Released: December 14, 1990

By the Chief, Mobile Services Division:

1. In Memorandum Opinion & Order, *Catskills RSA Limited Partnership*, DA 90-1611 (released November 13, 1990), the entity referred to in paragraph 12 as holding the minority limited partnership interest was inadvertently misidentified. Accordingly, paragraph 12, line 8, the third sentence, is corrected to read as follows:

> Margaretville Telephone holds only a minority limited partnership interest in the settlement applicant.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-471

In the Matter of

AT&T Communications — Transmittal No. 1215

Tariff F.C.C. No. 15
Competitive Pricing Plans -
Holiday Rate Plan

ORDER ON RECONSIDERATION

Adopted: November 20, 1990; Released: December 14, 1990

By the Commission:

1. On October 20, 1988, International Telecharge, Inc. (ITI) filed a petition for reconsideration of the Commission's September 20, 1988, Memorandum Opinion and Order instituting an investigation of AT&T's Holiday Rate Plan.[1] AT&T Communications (AT&T) filed a motion to dismiss and ITI filed an opposition to the motion to dismiss. For the reasons set forth below, we dismiss ITI's petition for reconsideration.

2. In Transmittal No. 1215, AT&T introduced its Tariff F.C.C. No. 15 through which it proposed to offer Competitive Pricing Plans. Each plan would establish customer-specific rates purportedly designed to meet the offerings of competing carriers. Transmittal 1215 also introduced the Holiday Rate Plan (HRP) as the first of the Tariff 15 plans. Fifteen parties petitioned for rejection or suspension and investigation of HRP. Finding that the petitioners had raised significant legal, policy, and factual issues, the Commission adopted the *HRP Investigation Order*, which initiated an investigation into the lawfulness of HRP.

3. On November 8, 1989, the Commission issued the *HRP Final Order*,[2] finding HRP unlawfully discriminatory under Section 202(a) of the Communications Act of 1934, 47 U.S.C. § 202(a). The Commission ordered AT&T to file tariff revisions removing the Holiday Rate Plan from Tariff 15.

4. ITI seeks reconsideration of the *HRP Investigation Order*, arguing that HRP is unlawful and requesting the Commission to reject Transmittal 1215. Alternatively, ITI asks that the tariff be suspended during the Commission's investigation. ITI Petition at 15-16. AT&T objects, saying that the *HRP Investigation Order* is an interlocutory Order, and therefore not subject to reconsideration under Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106. AT&T also argues that the Commission does not have authority to suspend a tariff after it has become effective. AT&T Motion at 2-4. ITI responds that the Commission has the authority to waive our own rules and grant reconsideration of the Order. Apparently conceding that suspension is not an available remedy, ITI reiterates its request for rejection of HRP. ITI Opposition at 10-11.

5. ITI seeks reconsideration of the Commission's decision allowing HRP to take effect subject to investigation rather than rejecting it. As noted above, subsequent to the close of the pleading cycle on ITI's petition, the Commission did determine that HRP is unlawful, and ordered AT&T to remove HRP from Tariff 15. Therefore, ITI's petition is dismissed as moot because it seeks a remedy that has already been effectuated.

6. Accordingly, IT IS ORDERED that the petition for reconsideration filed by International Telecharge, Inc., IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* AT&T Communications, 4 FCC Rcd 7712 (1988) (*HRP Investigation Order*).

[2] *See* AT&T Communications, 4 FCC Rcd 7933 (1989) (*HRP Final Order*), *recon. denied*, 5 FCC Rcd 1821 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLTEL CORPORATION — AAD 90-14

Petition for Waiver of Section 36.125(f), Sections 36.154(e) (1) and (2), and the Definition of "Study Area" contained in Part 36, Appendix-Glossary of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 1990; Released: December 14, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On April 9, 1990, ALLTEL Corporation (ALLTEL) filed a petition on behalf of its subsidiary local exchange companies Texas Midland Telephone Company (Texas Midland), Trinity Valley Telephone Company (Trinity Valley), and Romain Telephone Company (Romain) requesting a waiver of Part 36 of the Commission's Rules relating to the definition of "study area" and various jurisdictional separations allocation factors.[1] To the extent discussed below, we grant this waiver.

2. ALLTEL indicates that it will merge operations of Texas Midland, Trinity Valley, and Romain into a newly formed company called Texas ALLTEL, Inc. The definition of study area contained in Part 36, Appendix-Glossary,[2] of the Commission's Rules states that the boundaries of a study area shall be frozen as they were on November 15, 1984. Thus, to form one new study area for its three affiliates, ALLTEL requires a waiver of that provision. ALLTEL also requests a waiver of Sections 36.154(e)(1) and (2) [3] of the Commission's Rules relating to the computation of a transitional Subscriber Plant Factor (SPF) and Section 36.125(f)[4] relating to the interstate weighting factor for local switching equipment, to the extent those allocators are affected by the merger.

II. SUMMARY OF PETITION

3. ALLTEL indicates that Texas Midland, Trinity Valley, and Romain have 9,425, 5,090, and 838 USF loops, respectively. It states that Texas Midland's 1989 non-traffic sensitive (NTS) cost per loop was $623.11, Trinity Valley's 1989 NTS cost per loop was $551.97, and Romain's 1989 NTS cost per loop was $613.85. ALLTEL also notes that Texas Midland received $1,537,648 in annual Universal Service Fund (USF) support, Trinity Valley received $660,676 in USF support, and Romain received $133,079 in USF support for 1989. ALLTEL estimates that merger of the three companies will result in an average cost per loop of $598.65, and the annual USF support will decline from $2,331,403 to $2,328,744.

4. It requests a waiver of Section 36.154(e)(1) and (2) to adjust the frozen interstate SPF for the new study area. ALLTEL proposes to average the 1981 frozen SPFs for the three affiliates to compute a new 1981 frozen SPF for Texas ALLTEL.[5] It states that the 1981 frozen SPFs for Texas Midland, Trinity Valley, and Romain are .177300, .243904, and .288400, respectively. ALLTEL claims that the 1981 frozen SPF for Texas ALLTEL will be .207049.[6]

5. ALLTEL also requests a waiver of the weighting factor requirement in Section 36.125(f) "to the extent necessary to reflect the decrease in the weighting factor that Trinity Valley and Romain Telephone Companies will experience under the consolidation."[7] This rule requires carriers with less than 10,000 access lines to multiply the interstate dial equipment minutes of use (DEM) factor times 3 when allocating Category 3 local switching cost to the interstate jurisdiction and for carriers with 10,001 to 20,000 access lines to multiply the interstate DEM factor times 2.5. It indicates that Trinity Valley and Romain, separately, now have less than 10,000 access lines, making them eligible to use a 3.0 interstate weighting factor for the jurisdictional separation of local switching equipment. ALLTEL asserts that the new consolidated study area, however, will have a total of 16,196 access lines[8] and will be eligible for a weighting factor of 2.5.

6. The merging of Texas Midland, Trinity Valley, and Romain into one new study area, according to ALLTEL, "would promote the public interest through more cost effective service flowing from improved operating and administrative efficiencies. Properly, ALLTEL's commitment to high quality local service would in no way be jeopardized by this merger."[9]

III. DISCUSSION

7. We have considered the petitioner's arguments and conclude that ALLTEL should be allowed to reconfigure its study area boundaries to reflect the merger of Texas Midland, Trinity Valley, and Romain Telephone Companies into Texas ALLTEL, Inc. The Commission adopted the requirement that study area boundaries be frozen to prohibit companies "from setting up high cost exchanges within their existing service territory as separate companies to maximize high cost support."[10] On the other hand, there are instances of study area changes that do not necessarily give rise to such concerns, for example, the merging of affiliate operations with two or more study areas into a single study area, or changes in study areas that result from the purchase or sale of exchanges in arms-length transactions. In these cases, a waiver may be justified if there is a minimal impact on USF support.

8. ALLTEL states that USF support for the newly merged company in comparison with the three independent affiliates will decrease annually by $2,659 based on 1989 data. We reviewed the past USF support received by ALLTEL for its three study areas and the estimate of the USF support ALLTEL will receive for the consolidated study area. As a result of our review, we believe that the consolidation will have minimal impact on the USF. Consequently, we believe that this merger does not conflict with the intent of the Commission in freezing study areas.

Accordingly, we waive the definition of "study area" set forth in Part 36, Appendix-Glossary, of the Commission's Rules.

9. We believe that a carrier that is either merging affiliate operations or buying or selling exchanges should notify the state commissions that have regulatory authority over it prior to seeking a waiver of the rules relating to the study area boundaries. In its petition ALLTEL states that it sought approval of the proposed merger from the Texas Public Utility Commission (Texas). In a letter subsequently filed in support of its petition, ALLTEL stated that in State Docket No. 9099, Texas approved the merger.[11] Moreover, Texas did not oppose the waiver request when we sought comment on the ALLTEL waiver. We believe therefore, that Texas has had sufficient opportunity to note any objections it may have to the ALLTEL request.

10. ALLTEL also indicates that the frozen 1981 SPFs for the three study areas should be averaged to determine the frozen 1981 SPF for the new area. We agree. Such an approach will have a minimal effect on the assignment of costs between interstate and intrastate jurisdictions. As a result, we believe that a grant of the waiver of Sections 36.154(e)(1) and (2) of the Commission's Rules to the extent necessary to adjust the frozen 1981 SPF for the modified Texas study area is justified.

11. We also grant ALLTEL's request for waiver of Section 36.125(f) to the extent that ALLTEL must calculate a new composite allocator that the rule requires. We find that ALLTEL should use a composite allocator that is derived by dividing the December 31, 1987 combined interstate investment in former Central Office Equipment Categories 4, 5, 6, and 7[12] for the three study areas by the combined total investment in these categories for these study areas. ALLTEL's use of a composite allocator calculated in this manner will conform to the policy that the Commission seeks to advance in Section 36.125(f).

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), That ALLTEL's petition for waiver of Section 36.125(f), Sections 36.154(e)(1) and (2), and the definition of "study area" set forth in Part 36, Appendix-Glossary, of the Commission's Rules IS GRANTED, to the extent set forth above.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] By *Public Notice* released April 25, 1990, 5 FCC Rcd 2708, we invited comments on ALLTEL's petition. On May 18, 1990, United States Telephone Association (USTA) filed comments in support of the waiver. No other comments were received.

[2] 47 C.F.R. Part 36, Appendix-Glossary.

[3] 47 C.F.R. §§36.154(e)(1) and (2).

[4] 47 C.F.R. §36.125(f).

[5] The new 1981 frozen SPF will be adjusted to reflect the transition prescribed by Section 36.154(f) of the Commission's Rules.

[6] ALLTEL filed additional information concerning the various study area SPFs and the approval of the proposed merger by the Texas Public Utility Commission in letters dated September 17 and September 25, 1990.

[7] ALLTEL Petition at 4.

[8] ALLTEL states that there are 10,119, 5,107, and 970 total subscriber lines per study area for Texas Midland, Trinity Valley, and Romain, respectively. This count differs from the USF loop count shown in para. 3, *supra*, because the subscriber line count is based on 1990 data and includes certain party lines, private lines and company official lines.

[9] ALLTEL Petition at 2.

[10] MTS and WATS Market Stucture, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 at para. 65 (December 12, 1984).

[11] *See* ALLTEL's September 17, 1990 letter referenced in footnote 6, *supra*.

[12] Former categories 4, 5, 6, and 7 were prescribed in Part 67 of the Commission's rules. Part 67 was superseded by Part 36 of the Commission's rules effective January 1, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-624

In the Matter of

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers

ORDER

Adopted: September 19, 1990; Released: December 7, 1990

By the Commission:

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I. INTRODUCTION

1. By this Order we prescribe for the interstate access services of local exchange carriers an authorized, overall rate of return on investment of 11.25%. Since January 1, 1987, local exchange carriers (LECs) have been authorized to earn a 12% rate of return. The new prescription will take effect January 1, 1991, and will remain in effect until it is replaced or superseded. All LECs, including those subject to price cap regulation, will be required to file revised access service tariffs reflecting this represcription.

2. The Rule Making record in this proceeding is extensive. Of 40 parties who filed Notices of Appearance, 31 have submitted one or more pleadings. The seven Regional Holding Companies (RHCs) and the United States Telephone Association (USTA) filed Initial Submissions on February 16, 1990. Nineteen parties filed Responsive Submissions March 27, 1990; the RHCs, USTA, and four other parties filed Rebuttals April 17, 1990.[1] Proposed Findings, filed July 2, 1990, were offered by 18 parties, and Reply Findings were filed on July 16, 1990, by 13 parties.[2] In addition to these pleadings, the record includes carrier responses to a Common Carrier Bureau (Bureau) data request; six monthly updates to those responses; a massive amount of material submitted in response to three discovery requests; several written *ex parte* presentations; and notices describing numerous oral *ex parte* presentations. [3]

3. Part 65 of the Commission's Rules establishes procedures and data requirements for LEC rate of return represcription proceedings. The rules provide a frame-

work for determining a single, or unitary, rate of return for the entire LEC industry based on data supplied by the Regional Bell Holding Companies (RHCs). Each RHC is required to file an initial rate of return submission containing three kinds of evidence of its cost of capital for interstate access service: (1) state public utility commission determinations of the cost of capital for the RHC's intrastate operations; (2) weighted average cost of capital calculations for the RHC, with the cost of equity components estimated using each of several "historical" discounted cash flow (DCF) formulas and (3) weighted average cost of capital calculations for firms having risk characteristics comparable to those of interstate access service ("comparable firms"), with the cost of equity components calculated using the "historical" DCF formulas. The rules also allow RHCs and other parties to submit other relevant evidence; in addition, the Common Carrier Bureau may require parties to submit any data or studies needed for a full and fair record.

4. In previous proceedings the Commission had concluded that the methods specified in Part 65 for choosing comparable firms and for calculating the weighted average costs of capital of such firms were not likely to produce useful estimates of the interstate access cost of capital, and that a "classic" DCF formula would in many circumstances produce more accurate results for both RHCs and comparable firms than the "historical" versions of the formula.[4] Therefore, at the time that we initiated this docket, we took the following two steps to assure creation of a full, fair, and useful record: First, we waived the rules governing the required comparable firms showing and invited parties to propose alternative comparable firms studies. Second, acting through the Bureau, we required the RHCs to submit with their initial rate of return submissions a series of "classic" DCF cost of equity calculations for the RHCs, for the Standard & Poors Industrials firms (the S&P 400), and for a large group of electric utilities. These data were to be updated monthly during the pendency of the proceeding.

5. The RHCs submitted all of the required evidence with their initial submissions. However, they, along with the other LEC parties to the proceeding, took the position that none of the required evidence should be relied on in reaching a decision in this represcription proceeding. They argued that state cost of capital determinations are irrelevant; that our DCF formulas are all incorrect; that the DCF method cannot be used to determine the cost of equity of the RHCs; and that the RHCs are not proper surrogates for the interstate access business. They also contended that the cost of debt and capital structure components of the RHC weighted average cost of capital calculations should not be used in determining an overall cost of capital for the LEC industry. Instead, they proposed that we use the cost of debt and capital structure of the Bell Operating Companies (BOCs). They offered a variety of alternative studies of the interstate access cost of equity. Their cost of equity estimates ranged from 14.75% to 18.25%. Their final recommendations for the overall unitary rate of return ranged from 12.25%-14.3%.

6. Non-LEC parties supported use of the required evidentiary submissions as the bases for our decision. They generally took the position that the average of the weighted average costs of capital of the RHCs, calculated using the classic DCF formula, should be considered to be the highest reasonable estimate of the cost of capital for interstate access service. Most of these parties recommended cost of equity findings in the range 11.1%-12.5% and overall unitary rates of return between 10.25%-10.6%.

7. In this Order we analyze the cost of debt and capital structure issues separately from the cost of equity issues. From these analyses we determine an embedded cost of debt, a debt/equity ratio, and a range of reasonable estimates of the cost of equity. We combine these components to determine a range of reasonable estimates of the overall weighted average cost of capital for interstate access service. After identifying this "zone of reasonableness," we then decide, based on policy considerations, where within that zone to prescribe the unitary rate of return.

8. *Cost of debt and capital structure.* We find that the capital structure of the BOCs should not be used in determining the overall interstate access cost of capital because the capital structure of those entities is subject to manipulation by the holding companies. We therefore adopt for this represcription proceeding the approach, embodied in the Part 65 rules, of using the composite cost of debt and capital structure of the RHCs in calculating the overall unitary rate of return. We find that the embedded cost of debt is 8.8% and the capital structure is 44.2% debt/55.8% equity.

9. *Cost of equity.* We examine the LECs' objections to the Part 65 cost of equity methodologies and conclude that we must reject their core contention that DCF estimates of the RHC cost of equity cannot be used as estimates of the cost of capital for interstate access service. We accord the most weight to a series of monthly classic DCF estimates of the RHCs' costs of equity for the period January 1990-July 1990. We examine the range and variability of those estimates, both among companies and across time, and conclude that a fair estimate of the industry-wide cost of equity is somewhat above the average of the RHC estimates. We also conclude that (1) our DCF formula might somewhat understate the RHC cost of equity due to the influence of investor expectations about cellular telephone, but (2) the RHC cost of equity is probably higher than the cost of equity for interstate access service due to the participation of RHCs in riskier nonregulated activities. Taking all these factors into consideration, we conclude that the range of reasonable estimates of the LEC interstate access cost of equity is 12.5%-13.5%.

10. This finding of a range of reasonable estimates based on the DCF-estimated costs of equity of the RHCs is corroborated by the cost of equity findings contained in recent rate of return determinations by state public utility commissions. It is also corroborated by a series of equity market benchmarks derived from the DCF estimates for the S&P Industrials and for electric utilities.

11. We examine each of the comparable firms studies offered by the LECs and conclude that no weight can be given to these studies. We also accord no weight to RHC cost of equity estimates made using the capital assets pricing model (CAPM), although we do not in principle reject that methodology. We reject the contention that increases in certain interest rates since the time of our last represcription proceeding require that we increase the authorized rate of return.

12. *Overall cost of capital.* Based on our cost of debt, cost of equity, and capital structure findings, we calculate a range of reasonable estimates of the interstate access cost of capital of 10.85%-11.4%.

13. *Prescription of the unitary rate of return.* After finding the "zone of reasonableness," we address the arguments of the parties concerning the relationship between the prescribed rate of return and such factors as telecommunications infrastructure development, and competition and bypass. We conclude that, because of our concerns about intrastructure development, we should exercise our judgment to select a unitary rate of return that is toward the upper end of the zone of reasonableness. Accordingly, we prescribe an authorized rate of return for the interstate services of local exchange carriers of 11.25%.

II. BACKGROUND

14. Prior to the divestiture of AT&T,[5] our practice was to prescribe a single rate of return for AT&T's interstate services.[6] AT&T in turn used the prescribed rate of return in calculating the compensation that the Bell Operating Companies (BOCs) and independent telephone companies received for use of their facilities in originating and terminating interstate calls. Represcription proceedings were held at irregular intervals, using traditional, trial-type hearing procedures.

15. With the AT&T divestiture and the Commission's adoption of the access charge system,[7] it became necessary for the Commission to develop a more streamlined represcription process that would allow the Commission to prescribe separate rates of return for AT&T and for the interstate access services of local exchange carriers.[8] In a multi-phased Rule Making proceeding,[9] the Commission adopted the current rules and procedures for represcribing, monitoring, and enforcing authorized interstate rates of return. These rules are found in Part 65 of the Commission's rules.[10]

16. Part 65 contains procedural rules for rate of return prescription proceedings and also prescription methodology rules. It also contains rules for monitoring and enforcing the interstate access rate of return. The Part 65 procedural rules provide for: a two-year represcription cycle;[11] mandatory initial data submissions by the RHCs; multiple opportunities for interested parties to participate through written submissions;[12] discovery in limited situations;[13] and additional evidentiary procedures, such as oral cross-examination of witnesses before an administrative law judge[14] and oral argument before the Commission in special cases.[15]

17. The prescription methodology rules[16] establish three basic methods to develop estimates of the actual cost of capital of the LECs in the provision of interstate access service. The first calculates a simple average of overall rates of return authorized by the state commissions in each state where the Bell Operating Company is the principal carrier.[17] The second develops a composite weighted average cost of capital for Bell Regional Holding Companies (RHCs).[18] The third calculates average costs of capital for groups of firms comparable in risk to an interstate access provider.[19]

18. The Part 65 rules determine the cost of equity component of the cost of capital for the RHCs and the comparable firms groups by using the discounted cash flow (DCF) methodology.[20] Part 65 requires the use of two distinct growth factors in the DCF formula, producing two costs of equity for the RHCs and the comparable firms. In the *84 -800 Phase II Recon. Order*, the Commission added an additional DCF methodology, the "classic" DCF, which uses more recent data than that specified by Part 65.[21] Part 65 also provides a method for calculating the average embedded cost of debt and average capital structure for the RHCs.

19. The monitoring and enforcement rules specify a fixed increment which, when added to the authorized rate of return, establishes a maximum allowable rate of return.[22] A monitoring period of two years is established for determining compliance with the maximum allowable rate of return.[23]

20. The rules also established an automatic refund mechanism which required an overearning carrier to refund the excess revenues, with interest, when that carrier's earnings exceed the maximum allowable rate of return for the earnings review period.[24] The automatic refund mechanism was overturned and remanded to this Commission by the United States Court of Appeals for the District of Columbia Circuit.[25] The court held the refund rule unreasonable based solely on a contradiction the court perceived between the refund mechanism and rate of return prescription it purports to enforce.[26] The court held that, because it found the refund rule could cause a carrier to earn less than the authorized rate of return, the refund rule was inconsistent with the view that the rate of return represents a minimum and maximum allowable return, a view the court attributed to the Commission.[27] The court, at the same time, affirmed its holding in *New England Telephone*,[28] which upheld this Commission's statutory authority to order refunds when a carrier has violated an outstanding rate of return prescription.

21. The *1986 Represcription Proceeding* was the first prescription proceeding conducted under the Part 65 rules. Although the Commission considered all of the evidence resulting from use of its Part 65 rules, the Commission accorded the most weight to the "classic" DCF methodology as applied to RHC data and the resulting cost of capital from use of that DCF methodology.[29] Based on both the quantitative analyses and other, qualitative factors, the Commission set the rate of return for interstate access at 12%.

22. The Commission subsequently proposed to amend the Part 65 prescription rules to refine certain methodologies.[30] We specifically noted, however, that "[t]he initial use of these procedures proved to be feasible and produced reasonable results."[31] Moreover, we found that "the initial utilization of the new rate of return represcription rules was successful."[32] The major methodological change proposed was the replacement of the comparable firms screening technique contained in §65.400 with a "cluster analysis" procedure.[33] Comment was also sought on carrier groupings, addition of a Capital Assets Pricing Model (CAPM), specifications to the Part 65 methodologies, refinements of the Part 65 DCF specifications, accounting methods for determining divisional cost of capital, and several procedural matters. We have not, as of this date, issued a final decision in CC Docket 87-463.

23. The Commission's rules originally contemplated a represcription every two years, with a new proceeding to begin in January of 1988.[34] In the *Deferral Order*, the Commission extended the 1986 rate of return prescription through 1989 in order to allow more study of the comments in Docket 87-463.[35]

24. After the *Deferral Order*, the filing date for the rate of return represcription proceeding was twice deferred.[36] In recognition of the delayed filing date and the fact that a represcription proceeding pursuant to Part 65 requires a

period of six months, the Bureau sought comment on the extension or revision of the current rate of return prescription.[37] At the same time the Bureau sought updated financial and economic data on which an interim rate of return could be based.

25. On December 21, 1989, this Commission adopted an interim prescription of 12% until a rate of return represcription proceeding could be completed pursuant to Part 65.[38]

26. This Commission initiated the present proceeding in the *Interim Prescription* Order. Although we recognized that the *Docket 87-463 Notice* refinements to Part 65 had not been completed, we found that "none of the changes proposed in the Notice, apart from the possible development of a new preferred comparable firms methodology, would have a material impact on the end result."[39] Moreover, we rejected suggestions by the parties that Part 65 was so flawed that we would need to complete Docket 87-463 prior to conducting a represcription proceeding. We stated: "[w]hen we began that Rule Making, it was with the explicit recognition that, while some refinements might be desirable, the Part 65 procedures had worked quite well."[40] Further delay of a full represcription, we found "for the sole purpose of considering the possible refinements described in the Notice of Proposed Rule Making in CC Docket 87-463 would not serve the public interest."[41] For purposes of the instant proceeding, we waived the comparable firms study required under Part 65 and authorized the Bureau to require submission of additional information as needed.[42]

27. In the four years since the 1986 Represcription Proceeding, we have proposed and adopted a price caps incentive regulation system for AT&T.[43] Under that plan we no longer prescribe an authorized rate of return for AT&T. We also began the process of developing a price caps plan for the LECs. In March, 1990, the Commission expanded the instant represcription proceeding to include the possible prescription of an automatic stabilizer and a sharing device as regulatory backstops to the LEC price caps plan.[44]

III. THE COST OF CAPITAL FOR LEC INTERSTATE ACCESS SERVICE

A. Capital Structure and the Embedded Cost of Debt.

1. Calculations for RHCs using Part 65 method.

28. Part 65 of the Commission's Rules requires the RHCs to calculate and submit the percentages of debt and equity in their capital structures and their embedded cost of debt.[45] The average of the RHCs' submissions produces a capital structure with 44.2% debt and 55.8% equity, and an embedded cost of debt of 8.8%. The data supporting these calculations is summarized in Appendix C.

2. Positions of the parties.

29. The LECs contend that only the capital structure and cost of debt of regulated telephone companies is relevant. They argue that the Part 65 focus on the total company capital structure includes capital associated with the RHCs' nonregulated businesses. The LECs found the average capital structure for the RHCs' telephone operating companies to be 40.5% debt and 59.5% equity, and the embedded cost of debt to be 8.8%.[46] The data supporting the LEC calculations is summarized in Appendix C.

30. The Maryland PC counters that the capital structure and cost of debt of an operating company are totally under the control of the parent RHC and can be manipulated to give the appearance that the regulated operation has a more costly capital structure (less debt and more equity) than that of the overall RHC. Maryland PC argues that Bell Atlantic, for example, has structured its operations to make it appear that its high risk nonregulated operations have a 87% debt and 13% equity capital structure and its low risk regulated operations have a 39% debt and 61% equity capital structure.[47] Bell Atlantic attributes the disparity between its overall capital structure (50% debt and 50% equity) and its regulated operating companies (39% debt and 61% equity) to its leveraged employee stock ownership plan (ESOPs) and to unique capital structure requirements of each of its nonregulated subsidiaries.[48]

3. Discussion/Conclusion.

31. As Maryland PC points out, the capital structures of utilities that are owned by holding companies can be controlled by the parent company. For this reason, regulatory commissions have often been cautious about using, for purposes of calculating a weighted average cost of capital, the debt/equity ratio of a subsidiary.[49] Traditional solutions to this problem include using the capital structure of the holding company in place of that of the subsidiary, and using a hypothetical capital structure. Part 65 combines these approaches by using a composite of the actual capital structures of the RHCs to compute a weighted average cost of capital for the interstate access operations of all LECs.

32. The LECs argue that the RHC capital structures should not be used because some RHC debt is related to nonregulated activities that have different capital needs than regulated telephone service. We acknowledge that some RHC debt supports nonregulated activities. However, RHC capital structures also include holding company debt that supports regulated operations and that would be excluded from our determinations if we adopted a capital structure based on BOC data alone.

33. An examination of financial statements at both the RHC and BOC level shows that two of the RHCs, Bell Atlantic and US West, account for most of the difference between the RHC and BOC industry wide debt/equity ratio. Bell Atlantic's holding company ratio is 49.7% debt and 50.3% equity,[50] while its operating company ratio is 40.0% debt and 60.0% equity.[51] Over ten percent of the holding company's long-term debt is attributable to two leveraged employee stock ownership plans (ESOPs).[52] US West's holding company ratio is 52.5% debt and 47.5% equity,[53] while its operating company ratio is 40.9% debt and 59.1% equity.[54] As with Bell Atlantic, the difference is largely attributable to the leveraging of an ESOP on the holding company's books.[55] These ESOPs benefit all RHC employees, including regulated telephone company employees that make up over 90% of the total RHC workforce. The LECs' methodology inappropriately would exclude all of this debt from the capital structure used in determining the weighted average cost of capital for the interstate access industry.

34. Neither our method of determining a capital structure, nor the method advocated by the LECs, produces an absolutely precise representation of the actual proportions of debt and equity that currently support regulated interstate access services. In light of the evidence cited in the previous paragraph, we believe that both our method and the LEC method are acceptable methods that produce, at this time, debt/equity ratios well within the limits traditionally considered acceptable for regulated telephone operations. However, adoption of the BOC capital structure for purposes of determining the unitary rate of return in this proceeding would provide an undesirable incentive for the RHCs to manipulate the capital structures of their operating company subsidiaries in the future in order to produce a higher proportion of equity and thus a higher overall cost of capital for regulated operations. For these reasons, we conclude that the Part 65 methodology is appropriate to establish the proportions of capital structure and embedded cost of debt. The debt/equity ratio, therefore, in this proceeding is established at 44.2% debt and 55.8% equity and the embedded cost of debt is 8.8%.

B. Cost of Equity: The Record.

1. Summary of required showings and submissions.

a. DCF Calculations for RHCs - Part 65 "historical."

35. The DCF formula for the cost of equity capital states generally that

Ke = D/P + G, where

Ke = cost of equity

D = annual dividend on a share of common stock

P = price of a share of common stock

D/P = dividend yield on a share of common stock

G = long-term growth rate of dividends

36. Part 65 requires each of the RHCs to submit estimates of its cost of equity calculated using two special "historical" versions of this formula. Using the first formula, Ke1 is to be calculated as D/P + G1; where D is the average annual dividend during the two calendar years that precede the represcription filing, P is the average daily price of the RHC's common stock during each trading day during the two calendar years that precede the represcription filing, and G1 is the annual rate of growth in dividends derived from the slope of the ordinary least squares linear trend line of quarterly dividends that were declared during the two calendar years that precede the represcription period. Using the second formula, Ke2 is to be calculated as D/P + G2; where D and P have the same definitions as above, and G2 is the simple average of the Institutional Brokers Estimate System (IBES) median long term growth rate estimates of earnings during the two calendar years that precede the represcription filing.[56]

37. The average of the "historical" DCF estimates of the cost of equity (Ke) and weighted average cost of capital (WACC) of the RHCs are as follows:

	Ke1	Ke2	WACC1	WACC2
Ameritech	13.98%	11.55%	11.49%	10.07%
Bell Atl	11.21%	11.96%	9.91%	10.29%
BellSouth	12.70%	12.22%	11.24%	10.95%
NYNEX	13.55%	12.15%	11.34%	10.56%
PacTel	10.25%	12.71%	9.89%	11.34%
SWB	9.27%	11.87%	9.18%	10.69%
US West	10.97%	11.85%	9.88%	10.30%
Average	11.70%	12.04%	10.42%	10.60%

b. DCF Calculations for RHCs -" classic " DCF

38. The January 5, 1990 Order required that the RHCs file estimates of their costs of equity using the "classic" DCF formula adopted in the *Phase II Reconsideration*. Under the "classic" formula, D is the expected annual dividend for the next year; P is the current share price; D/P is the current yield; and G is the currently-expected long-term growth rate, represented in our formula by the current IBES median long-term growth estimate.

39. The RHC estimates from the period January, 1990 to July, 1990 are as follows:

	Jan	Feb	Mar
Ameritech	11.53%	11.83%	11.49%
Bell Atl	12.14%	13.06%	12.55%
BellSouth	11.81%	12.30%	12.17%
NYNEX	11.25%	11.96%	11.75%
Pactel	12.07%	12.76%	12.65%
Southwestern	11.66%	12.04%	11.84%
US West	11.53%	11.93%	11.76%
Average	11.71%	12.27%	12.03%

	Apr	May	Jun	Jul
Ameritech	11.41%	11.52%	11.87%	12.19%
Bell Atl	12.43%	12.67%	12.87%	13.13%
BellSouth	12.07%	12.01%	12.09%	12.29%
NYNEX	12.72%	13.61%	13.02%	13.54%
Pactel	12.74%	12.66%	12.68%	12.92%
Southwestern	11.76%	11.87%	12.12%	12.40%
US West	11.63%	11.66%	11.61%	11.71%
Average	12.11%	12.28%	12.32%	12.60%

c. State cost of capital determinations.

40. The LECs submitted, as required by Part 65, all of the state cost of capital determinations applicable to their operating companies. In some cases they also submitted adjustments required to conform the state determinations to this Commission's rate of return policies. The averages of the state authorized overall rates of return are as follows:[57]

Without adjustments:	11.39%
Adjusted:	11.66%

d. Comparable firms

41. Section 65.400 of the Rules describes information filing requirements and screening methodologies for the selection of sets of firms that have risk characteristics that are comparable to interstate access service.[58] The requirements of §65.400 have been waived for purposes of this represcription proceeding.[59] Expert witness statements offering alternative comparable firms analyses, and other studies of the interstate access cost of equity were submitted by the parties and are described in III. B.10-.13 below. The following table summarizes the results of these studies:

	Recommended Cost of Equity
Phillips (Ameritech)	15.50%
Linke (Ameritech)	15.50-15.70%
Vander Weide (Bell Atlantic)	15.00%
Carleton (BellSouth)	14.80%
Carleton (NYNEX)	14.85%
Cogswell (NYNEX)	14.75-16.00%
Avera & Fairchild (Southwestern)	14.25-15.50%
Siegel (US West)	15.90%
Clinger (Florida Citizens)	10.50-12.20%
Copeland (Colorado CC)	12.50%
Miller (Consumer Coalition)	11.50-11.90%
Winter (GSA)	11.70%
Johnson (Indiana/Ohio CC)	11.20-12.70%
Kahal (Pennsylvania OCA)	11.00-12.00%
Klein (Tennessee PSC)	12.80%

e. Equity market benchmarks

42. Section 65.102(a) of the Rules provides that the Chief, Common Carrier Bureau, "may require from carriers providing interstate services, and from other participants submitting rate of return submissions, data or studies that are reasonably calculated to lead to a full and fair record"[60] in a represcription proceeding conducted under Part 65. Pursuant to this section, and to the direction of the Commission,[61] the Bureau has required carriers subject to the mandatory filing requirements of §65.201 to submit cost of equity data from 1980 to the present for the companies in the Standard and Poor's list of 400 Industrial Companies (S&P 400) and for a group of large electric utility companies, and from 1984 to the present for the RHCs.[62] These data were to be updated monthly until the issuance of a Sunshine Notice listing this docket on the agenda for a Commission meeting.

43. The data request required submission of two exhibits. Exhibit B was to contain all of the underlying data needed to make DCF cost of equity calculations for all of the companies covered by the request. Exhibit A was to organize these data as follows: The S&P 400 group and the electric group were to be screened to remove (1) companies that did not pay quarterly dividends; (2) companies that did not have at least 5 analyst estimates of long-term growth reported by IBES; (3) companies with long-term growth estimates greater than 15%; and (4) companies with DCF estimates lower than the interest rate on 10-year treasury bills. The companies were then to be ranked in descending order by DCF estimate, with the median DCF estimate calculated for each quartile. A simple average estimate was to be calculated for each of the three groups. The results of this data request are summarized, in graphic and tabular forms, in Appendix E.

f. Telecommunications plant investments and sources and uses of funds.

44. The Bureau *Data Request* also required carriers subject to the mandatory filing requirements of §65.201 to submit for each operating company specified historical and projected data concerning deployment of various categories of switching equipment; deployment of various categories of transmission facilities; construction programs; and sources and uses of funds. Tables summarizing these data are contained in Appendix F to this Order.

2. The Parties' Recommended Returns on Equity ROE and Recommended Overall Rate of Return (ROR).

45. The following table summarizes the final recommendations of those parties that filed proposed findings addressing cost of capital issues:

	ROE	ROR
Ameritech	15.50%	13.00%
Bell Atlantic	15.00%	12.40%
BellSouth	14.80%	12.50%
NYNEX	14.3-15.4%	12.25-13%
Pactel	16.20%	13.20%
Southwestern Bell	15.00%	12.50%
US West	15.90%	12.90%
USTA	14.75-18.25%	12.3-14.3%
GTE		13.00%
Rochester		12.30%
ARINC		< 12.00%
Consumer Coalition	11.5-11.9%	10.60%
GSA	11.70%	10.49%

3. Objections to Historical DCF

a. Issue

46. Part 65 of the Commission's rules sets forth two versions of the DCF method, both of which use 2-year historical averages for the stock price, dividend, and growth elements of the DCF formula.[63] The LECs object to the historical nature of the Part 65 DCF method.

b. Positions

47. The LECs object to the Part 65 DCF method on the bases that it uses stale data which yield a downward biased cost of equity[64] and is inconsistent with the expectational nature of the true "classic" DCF. [65] The LECs also contend that the Part 65 DCF method was ignored by the Commission in the *1986 Represcription Proceeding* [66] and was to be refined in the CC Docket 87-463 proceeding.[67] No party to this proceeding advocates use of the Part 65 DCF method.

c. Discussion

48. We agree with the LECs' criticisms of the Part 65 use of historical data. The Part 65 formulas were an attempt to maximize the certainty with which the inputs to the DCF formula could be determined. Experience with the formula in two represcription proceedings demonstrates, however, that this approach has not produced reliable results.[68] Averaging the inputs to the DCF formula over such an extensive period yields estimates of the cost of equity capital that neither fully reflect current market requirements nor reveal the historical trend in market requirements. We now believe that the "classic" DCF formula using expectational data is more in accord with underlying theory. We shall therefore accord no weight to the DCF estimates produced in accordance with the Part 65 "historical" DCF formulas.

4. Objections to state cost of capital determinations.

a. Issue

49. Part 65 requires RHCs to submit as evidence in rate of return represcription proceedings state cost of capital determinations applicable to their operating companies. LECs object to use of state-determined costs of capital in the prescription of a unitary rate of return for interstate access services.

b. Positions

50. The LECs take the position that state rate of return prescriptions should be given no weight. They argue that the state prescriptions provide no useful information because they are not based upon the most recently available data, because not all differences in ratemaking methods are known or can be adjusted to make the prescriptions comparable and because interstate access and state regulated services have different risks. The LECs observe that the adoption of regulatory reform in many states further complicates the interpretation of state prescriptions. Finally, the LECs argue that there is an improper circularity of logic if a commission considers what other commissions have prescribed.[69] The Tennessee PSC argues that the older state prescriptions overstate the current cost of capital.[70]

51. The Consumer Coalition maintains that the state rate of return determinations provide a "reality check" on the cost of equity estimates submitted by the parties and that the more recent orders could at least serve as an overview of what other commissions are finding as to LEC capital costs.[71]

c. Discussion

52. We are well aware of the infirmities, both potential and real, of the state cost of capital determinations on the record. The arguments raised by the parties against any use of state determinations have been considered and rejected in previous proceedings.[72] The fact that different methodologies are employed by some states does not render them worthless for our purposes. We recognize these differences by allowing the LECs to adjust the state authorized rates of return for compatibility with this Commission's methods. The LECs' concern over the circularity of giving any weight to the decisions of other regulatory commissions is misplaced in a proceeding that has as substantial a record as this one. Similarly, we believe that the LECs overstate the dangers of misinterpretation in considering the rates of return prescribed by states that have also adopted incentive regulatory plans. We have reviewed the texts of the state rate cases in which such plans were adopted, and it appears that most states have made conventional cost of equity determinations immediately prior to, or in conjunction with, the adoption of incentive regulation plans.

53. In any case, we agree that a simple average of state cost of capital determinations, some of which are the same as the ones submitted over four years ago to the record of our last represcription proceeding, is not entitled to great weight as an estimate of the current cost of capital. We find, however, that the most recent state decisions should be given weight as a check on the reasonableness of the current cost of equity figures reached by all the parties, and as an indicator of trends. We also find that the state cost of equity determinations are more useful than the overall costs of capital because the cost of equity determinations of different commissions can be compared without the necessity of making adjustments for differing rate base and capital structure methodologies. For those ten state decisions occurring during 1989 and 1990, the average state determined estimated cost of equity is 12.94%.[73]

5. Objections to Use of Equity Market Benchmark Data

a. Issue

54. The LECs contend that, in reaching conclusions in this represcription proceeding, the Commission should disregard the equity market data submitted in response to the *Data Request Order*.

b. Positions

55. USTA, Pactel, and Southwestern object to the screens used in the *Data Request Order* to eliminate companies for which the DCF results could be presumed unreliable. These parties argue that the data is improperly skewed downward because companies with growth rates in excess of 15% were, without any articulated reason, excluded from the quartile rankings of the S&P 400. USTA also claims that companies whose estimated costs of equity do not exceed their own debt costs should have been excluded from consideration.[74] The LECs also contend that the data was improperly averaged, and that "to provide any meaning in the process" the DCF results must be weighted by the firms' market values.[75]

56. The LECs also raise, with reference to the data request, their objections to any consideration of electric utility companies as possible surrogates for the LEC interstate access business. Finally, they argue that the equity market data submitted in response to the *Data Request Order* cannot be used in this represcription proceeding because the LECs have not had sufficient opportunity to comment upon its contents or the manner in which it will be used.

c. Discussion

57. In the *Interim Prescription Proceeding* the LEC industry argued that the costs of equity for the S&P 400 firms constituted an appropriate benchmark against which the Commission could assess other estimates of the cost of equity.[76] Other parties argued that we should also give consideration to information about the costs of equity of electric utilities. The Commission did not reach conclusions on these issues in the *Interim Prescription Order*,[77] and the parties, as expected, have renewed their contentions in the instant proceeding. A major purpose of the data request was to assure that all participants in the instant represcription proceeding, including this Commission and its staff, would have access to the underlying data necessary to evaluate these proposed benchmarks.[78]

58. The Bureau's apparent purpose in screening out from Exhibit A the DCF estimates for companies with growth estimates above 15%, and for companies with DCF estimates below the risk-free interest rate, was to remove from consideration any estimates that were improbably high or improbably low. Upon inspection of the underlying data contained in Exhibit B, we agree with the LECs that the removal of companies with high growth rates produces a significant and inappropriate downward bias to the Exhibit A data. We also find that it might have

been more appropriate to have used the average single A corporate bond rating, rather than the risk-free rate, as a screen for improbably low estimates. We have, accordingly, removed the upper screen from the data, and reset the lower screen. We have recalculated the quartiles, median estimates, and overall averages for the S&P 400 data in Exhibit A. The results of these recalculations are reflected in the charts in Appendix E.

59. We disagree with the LEC contention that the S&P data is meaningless unless market weighting is applied to the data. Market-weighting might be desirable if we were attempting to calculate a cost of equity estimate for an S&P 400 "market basket" portfolio of stocks or if we were interested in determining the historical earned return on equity of such a portfolio. However, we do not intend to use the S&P data for these purposes. Rather, we view the S&P 400, or, more properly, the subset of the S&P 400 for which sufficient data is available to make DCF calculations, as simply a large group of publicly-traded companies that is roughly representative of the universe of nonregulated firms. By ranking these firms in order of their DCF estimates, we can get a sense of what the investor required returns are for firms with average, below-average, and above average costs of capital. Viewed in this way, each firm's DCF estimate is of equal value as a test of the cost of equity, and there is no reason to afford greater weight to the estimates of the companies with the largest market values.[79]

60. We reject the contention that we cannot use the data submitted in response to the *Data Request Order* because parties have had insufficient opportunity to comment upon it. First, these data were first submitted with the initial submissions on February 16, 1990. All parties have thus had ample opportunity to comment upon the data, both in the initial round of comments and in their proposed findings. Second, the parties have in fact commented upon the data submission, and we have responded herein to their criticisms.

6. "Classic" DCF Specification Issues

a. Stock price

i. Issue

61. One of the components in the DCF formula is the price of the company's stock, which is divided into the expected dividend to produce the stock's yield. Although, the "classic" formula requires a current stock price, it is usually desirable to average the price over some relatively short period of time, thus avoiding reliance on a single day's stock price. In the *1986 Represcription Order*, the Commission made "classic" DCF estimates that computed the stock price over two different periods: a 90-day average and the 10 days preceding and 10 days following the release of the pertinent IBES forecast.[80] The carriers' submissions in response to the *Data Request Order* provide the average of monthly highs and lows for both the quarterly estimates for the 1980-1988 period, and for the monthly estimates beginning January 1989.

ii. Positions

62. The parties used varying time periods in their DCF studies filed herein. In his DCF analysis, Consumer Coalition witness Miller relied on the average monthly stock prices for the fourth quarter 1989 and a March 9, 1990 "spot" stock price.[81] Vander Weide recommends averaging over a three-month period because investment analysts usually change their forecasts on a quarterly basis.[82]

iii. Discussion

63. We have before us in this proceeding monthly DCF estimates for the RHCs for seven consecutive recent months. The stock price used for each monthly estimate is the average of the monthly high and low stock prices. We find that these monthly periods are sufficiently long to eliminate the possibility that a particular price may be an aberration, but recent enough to assure that data from past periods do not obscure trends. We therefore adopt for purposes of this represcription the approach taken by the carriers in response to the *Data Request Order*.

b. Expected dividend

i. Issue

64. The other component of yield in DCF analysis is the annual dividend. The "classic" DCF formula requires use of an expected dividend because investors base their decisions in part on what they expect the dividend will be during the coming year, not simply on what the dividend is at the time the stock is purchased. In the *1986 Prescription Order*, the Commission made "classic" DCF estimates using two different methods of computing the expected dividend: (a) the current annualized dividend grown by the IBES growth rate; (b) the current annualized dividend grown by one-half the growth rate, to account for the fact that there are timing differences among the companies as to their dividend increases.[83] The *Data Request Order* herein required the carriers to compute the expected dividend by growing the annual dividend by one-half the growth rate. LECs argue that the full growth rate should be used.

ii. Positions

65. The Consumer Coalition urged the use of the annual dividend grown by one-half the growth rate.[84] Its witness Miller states that this method is more accurate than growing the dividend by the full growth rate, which he estimates adds 15 to 20 basis points to the cost of equity. The BOCs' witnesses in some cases, however, used the full growth model.[85] USTA criticized the one-half growth model because, in its view, that model assumes that the growth in the first annual period is one-half the expected long term growth.[86]

iii. Discussion

66. If we were to determine the dividend yield at a point during the year just before the carriers were to announce a dividend increase, it might be accurate to grow the dividend rate by the full year's expected growth. That is not the case here, however, because the BOCs' dividends have been increased during the past six months and the stock prices we use are based on those higher dividends. Growing the rate by the full amount now would overstate estimated annual growth. We believe that growing the dividend by one-half of the annual growth rate more accurately reflects what investors expect to be paid in the coming year. The BOCs' preferred method, full growth applied to a dividend that was increased within the past six months, would provide a windfall to investors due to dividend timing.

c. Expected growth

i. Issue

67. The expected growth element is always the most debatable part of the DCF formula. Ideally, the "G" in the DCF formula represents the growth in dividends, earnings, and stock price that investors expect to experience if they hold a stock indefinitely. Since we cannot directly observe the collective expectations of investors, however, the growth element must be estimated. There are many possible ways to estimate growth, including extrapolation from historical growth trends and fundamental analysis of a company's prospects. In recent years many rate of return expert witnesses have come to use the analysts' consensus long-term growth estimates published by Institutional Brokers Estimate Service (IBES) as a reasonable approximation of the growth expected by investors. The Commission adopted the IBES growth estimates for use in the "classic" DCF formula in its 1986 represcription.

ii. Positions

68. The LECs generally accept IBES growth estimates for use in DCF calculations for comparable firms groups and for broadly-representative groups such as the S&P 400.[87] They contend, however, that the IBES estimate produces downwardly-biased results when the formula is applied to the RHCs. Non-LEC parties generally accept use of IBES, although some offer cost of equity analyses using other growth estimates.[88]

iii. Discussion

69. We continue to view the IBES growth estimates as appropriate inputs into the DCF formula. The LEC view that IBES produces incorrect results when applied to the RHCs is addressed in section III. C.8. below.

d. Quarterly Compounding

i. Issue

70. The issue has arisen in previous Commission rate of return proceedings whether the quarterly dividend should be compounded (thereby yielding a higher annualized dividend component) to account for the fact that dividends are paid quarterly rather than annually. The Commission most recently addressed this matter in the *Phase II Reconsideration Order*, and determined that compounding the quarterly dividend should not be incorporated in the DCF formula. The Commission noted the carriers' arguments favoring compounding -- that they should be allowed to use an annual dividend higher than the sum of the quarterly payments because they do not have use of the dividends over the entire year.[89] The Commission found three reasons why compounding is not necessary in our rate of return proceedings: (a) compounding is reflected in the revenue requirement due to the Commission's use of a mid-year rate base; (b) the adjustment adds a complexity that is not offset by increased accuracy; and (c) it is not clear that the investment community uses a quarterly-compounding growth model and that such a model affects the market price.[90] In the *1986 Represcription Order*, the Commission noted these shortcomings in the carriers' arguments for compounding and declined to make a specific adjustment to reflect dividend timing; rather, the Commission stated that it would take such matters into account by adjusting upward the quantitative result produced by the DCF formula.[91] The *Data Request Order* in this proceeding did not contemplate quarterly compounding of the dividend.

ii. Positions

71. The carriers generally advocate the quarterly-compounding adjustment.[92] Briefly stated, proponents of compounding assert that the DCF formula must recognize the time value of dividend payments, and it is clear that the required equity return would be higher if the company paid a single, annual dividend at the end of the year.[93] The Consumer Coalition and state representatives generally oppose compounding.[94] They argue that quarterly payment of dividends in fact overstates, rather than understates, a carrier's revenue requirement,[95] that compounding fails to reflect that the carrier receives its return dollars continuously rather than with a one-year lag,[96] and that carriers earn the benefits of compounding when they, as the BOCs, retain earnings.[97]

iii. Discussion

72. The parties favoring compounding do not directly counter the considerations noted above that led the Commission to reject that model after full consideration of the issue in CC Docket 84-800. Although we acknowledge that the experts are divided as to the technical effect of using an annual model, we remain convinced that the dividend yield component of the DCF is not understated because the quarterly dividends are not compounded. As we noted in the *Phase II Reconsideration Order*, a key consideration in deciding to adjust the dividend to account for the timing of payments is whether the investment community uses that model in a way that affects the BOCs' market prices. There is no such evidence in this record. The rate of return that we prescribe herein is higher than a simple quantification of the DCF formula, to reflect (as we did in the *1986 Prescription Order)* that there are a number of factors that cannot be quantified. That decision, coupled with our use of a mid-year rate base, assures that investors do not receive an unduly low stream of revenues because of timing differences. Moreover, as witness Carleton notes, the difference in computations is minor -- too minor, in our view, to attempt to codify a theoretical, complex adjustment that is disputed by the experts.

e. Flotation

i. Issue

73. When a company issues stock, it incurs out-of-pocket expenses associated with getting the stock into the hands of investors. The company may also experience another, indirect cost -- a temporary reduction in the market value of the stock due to the issuance of additional shares. These are described collectively as flotation costs. In the *Phase II Order*, the Commission considered whether and to what extent to include an allowance for flotation costs in determining the cost of equity. After reviewing many comments on the issue, the Commission concluded that a one-time upwards adjustment of ten basis points on the cost of equity was warranted.[98] The Commission affirmed this decision on reconsideration.[99]

ii. Positions

74. The LECs advocate that the DCF calculation include an allowance for flotation: implementation of their recommendations would add increments of 30-60 basis points to the cost of equity. The BOCs assert that the allowance is necessary even though the carrier may not plan to issue any stock during the year that the rate of return is to be effective.[100] Several BOCs estimate a flotation cost of 5% based on their experience in raising equity capital.[101] The Consumer Coalition and state representatives generally oppose including a flotation allowance in the DCF computation. They assert, for example, that the carriers have not demonstrated that flotation costs were actually incurred but not recovered or that equity issues are planned.[102] The Consumer Coalition states that utility investors know that equity issuance costs are not amortized and that this factor is reflected in the stock prices. Therefore, in their view, any adjustment for flotation would provide stockholders with a windfall.[103]

iii. Discussion

75. The carriers' arguments in favor of an adjustment for flotation costs are essentially those that we considered and rejected in CC Docket 84-800. Accordingly, we will not include an adjustment for flotation in our DCF computation. It is undisputed that the RHCs are not issuing stock at this time, and there is no evidence (other than theoretical computations such as that of Ameritech witness Linke) that past costs remain unrecovered. Therefore, the carriers are not able to satisfy the requirement in the *Phase II Reconsideration Order* that they demonstrate the need to recover actual costs, not simply rely on general assertions.[104] Moreover, it does not appear that our treatment of flotation costs has adversely affected the carriers stock prices -- indeed, their market to book ratios are nearly 2:1. Thus, there is no credible evidence that our procedure is driving the LECs' market value to below book value. If the carriers are genuinely concerned because they do not recover the costs of issuing stock in the same way that they recover the costs of issuing debt, their recourse is to seek a change in our prescribed accounting system.

7. Objections to Use of RHCs as Surrogates

a. Issue

76. In order to prescribe an interstate access rate of return, we must estimate the cost of equity for LEC-provided interstate access. Because it is not actually possible to buy stock in the LECs' interstate access operations, surrogate firms must be chosen to represent the interstate access business in any cost of equity analysis.[105] The surrogate firms should have risk characteristics similar to those of interstate access. In the Docket 84-800 Rule Making the Commission adopted the Regional Bell Holding Companies (RHCs) as a surrogate group of firms for the interstate access industry.[106] The Commission stated that the RHCs would be good surrogates because they were "relatively 'pure play' (*i.e.*, over 90% of their revenues are derived from regulated telephone activities), their stock is widely held and actively traded, and a substantial number of financial analysts track their performance." [107] In the instant proceeding the parties debate whether, in light of RHC diversification into nonregulated activities, an RHC's cost of equity, which reflects investors' perception of the risks of all of the RHC's lines of business, is still a reasonable approximation of the cost of equity of interstate access services.

b. Positions

77. The LECs present several arguments against the use of the RHCs as surrogates for the interstate access industry. The LECs conclude that any application of the DCF formula to RHC data would result in a downward bias of LEC cost of capital.[108] First, the LECs contend that the RHCs are no longer "pure play" telephone companies because of their diversification into lines of business with different risks from the provision of interstate access; they are therefore, no longer suitable surrogates.[109] Bell Atlantic claims that the Commission, in CC Docket 87-463, recognized that the RHCs were no longer appropriate surrogates when the Commission stated that the Part 65 rules needed to focus on the cost of capital of regulated operations, rather than on cost of capital of the whole company.[110]

78. Second, Bell Atlantic, through its expert, Dr. James H. Vander Weide, specifically argues that RHC diversification creates a "portfolio effect", thereby making the risk of the RHC lower than its LECs.[111] Vander Weide reached his conclusion by examining the correlation coefficients of investor returns achieved on publicly-traded companies similar to those included in the Bell Atlantic portfolio.[112] He characterizes the correlation between the three telephone companies and the nonregulated companies as low, even negative in some cases, indicating that a large degree of diversification potential exists in Bell Atlantic's portfolio; *i.e.*, Bell Atlantic's diversification creates a "portfolio effect".[113] Vander Weide then compares the operating income variability for Bell Atlantic and its LECs to show the impact of the "portfolio effect" on the riskiness of Bell Atlantic. The results of his comparison indicate that the weighted average of the operating income variabilities of the LECs were greater than the operating income variability of the Bell Atlantic RHC.[114]

79. Third, the LECs argue that the DCF formula should not be applied to RHC data because the growth rates and business risks of the RHCs' diverse entities violate critical assumptions of the DCF model.[115] Finally, a few LECs maintain that use of the RHCs as surrogates is inappropriate because a portion of their activities is regulated, and thus, use of RHC data would create circularity into the regulatory process.[116]

80. Non-LEC parties maintain that investors perceive local exchange service as the RHCs primary business, and therefore, RHCs remain excellent surrogates for determining the cost of capital for interstate access service.[117] These parties also contend that RHC business risk is greater than that of its telephone operating companies because of RHC diversification into unregulated businesses.[118] In response to the LEC argument that diversification, due to different growth rates among business lines, makes it impossible to apply the DCF formula to RHC data, Consumer Coalition states that the LECs' argument fails to account for the LECs' use of DCF to other firms which also have different lines of business with varying growth rates.[119]

81. The non-LEC parties also criticize Bell Atlantic's "portfolio effect" argument. Maryland PC states that the income variability of Bell Atlantic's telephone subsidiaries during the period analyzed by Vander Weide is due solely to the rate reductions made to reflect the lowering of federal income tax rates.[120] Consumer Coalition's expert,

Ralph E. Miller, objects to Vander Weide's analysis on several grounds. Miller argues that, absent a perfect correlation between Bell Atlantic's subsidiaries, summing any measure of the subsidiaries business operations, as Vander Weide did in reaching the Bell Atlantic operating income variability, is likely to produce a lower variability than the average of the separate variabilities.[121] He contends that this effect proves nothing about Bell Atlantic's nonregulated subsidiaries. Moreover, Miller asserts that operating income variability is not an appropriate risk measure, and that a more valid measure of investment risk would reflect the variability of returns rather than the variability of the absolute level of income.[122] Miller also argues that some of the risk criteria used by Vander Weide in his comparable firms analysis for USTA show RHC nonregulated activities increasing investment risk.[123] He contends that the high sales growth rates and betas associated with cellular are exactly what Vander Weide's USTA analysis would interpret as high risk. He notes that the real estate and leasing activities of the RHCs are more highly leveraged than the BOCs and thus add to the overall debt risks of the RHCs.[124] Consumer Coalition also finds support for its position from NYNEX's witness, Carleton:

> Under contemporary financial principles and evidence, investors in shares of diversified unregulated companies realize neither risk diversification benefits nor costs from corporate diversification because investors can do the portfolio risk diversification for themselves.[125]

In rebuttal, Vander Weide states that Miller's perfect correlation criticism is invalid because the operating income variability of the combined Bell Atlantic LECs still exhibits much higher variability than that of Bell Atlantic as a whole.[126] Bell Atlantic also argues that the correlation analysis of the three telephone companies with the selected nonregulated businesses proves the "portfolio effect" exists.[127]

82. Non-LEC parties also argue that, even if the "portfolio effect" exists, the benefits from such diversification should not all flow to the nonregulated companies; some benefit should pass to the ratepayers.[128] In rebuttal, the LECs contend that any benefits from the "portfolio effect", *i.e.*, lower business risk, should not flow through to the interstate access ratepayers because the Commission has stated that the cost of capital for telephone service should be based on telephone service alone.[129]

c. Discussion

83. Although we recognize that the RHCs are more diverse today than they were at the time of the *1986 Represcription Proceeding*, the primary business of the RHCs is still regulated telephone service. Over 80% of total RHC revenues still come from regulated operations. We find that the increase in RHC diversification, in and of itself, is not *prima facie* evidence that RHCs are no longer acceptable surrogates for the interstate access business. We also note that Bell Atlantic misinterprets the Commission's position in the *87-463 Notice* on the continued appropriateness of RHCs as surrogates. In the *87-463 Notice*, the Commission did not find the RHCs inappropriate surrogates, rather comment was sought on the possibility of adopting specific techniques for estimating cost of equity for a single line of business within a company.[130]

84. We find it obvious that most competitive, nonregulated businesses are riskier than the regulated interstate access business. It seems counterintuitive to suggest, as Bell Atlantic does, that diversification into riskier businesses could actually reduce the business risk of an RHC so that it is lower than the business risk of the regulated telephone business. We agree with a 1988 Standard & Poors credit rating report, portions of which the LECs cite in the record and rely on to support their positions on other issues, stating that diversification almost certainly nvolves moving into areas with higher business risk than the core telephone business, and portfolio effects "may limit the rise in overall business risks, but won't eliminate it."[131]

85. We do not find Dr. Vander Weide's operating income variability study persuasive on the issue of the existence of a portfolio effect because we do not accept his premise that any line of business Bell Atlantic pursues, so long as it does not exactly match the operating income pattern of Bell Atlantic's regulated activities, will reduce the company's risk and cost of capital. We observe that there is little evidence that conglomerates enjoy lower costs of capital than other, less diversified companies. We find that Bell Atlantic has not demonstrated the existence of a portfolio effect that would cause RHC risk to be lower than LEC interstate access risk. Consequently, we find that the "portfolio effect" does not preclude the use of the RHCs as surrogates for determining the cost of capital for the interstate access business.

86. However, the record does show that the RHCs are also involved in activities which are perceived as riskier than their regulated telephone business. We therefore find that we should give some weight in our decision to the possibility that a cost of equity estimate for an RHC as a whole company might somewhat overstate the cost of equity for interstate access service alone.[132]

87. The LECs' position that, due to the uniqueness of the RHCs, the DCF formula cannot be applied to RHC data, is addressed fully in the next section of this order, below.

8. The "Cellular Argument"

a. Issue

88. As we have previously noted, the "growth" element of the DCF always represents an estimate of an ultimately unknowable quantity, namely, the rate at which investors expect the yield of the stock to grow over the long term. The Commission's DCF formula uses the IBES long-term (five year) analysts' consensus growth forecast. In this proceeding the LECs contend that DCF estimates for RHCs using the IBES growth forecast are meaningless because of the impact of investor interest in the very long term growth prospects of cellular telephone service.

b. Positions

89. The LECs claim that a DCF analysis using RHC data understates the RHCs' cost of equity because the growth rates available for use in the formula fail to reflect the growth that investors are actually expecting RHCs to achieve by virtue of their cellular communications operations. They contend that investors' expectations are fully

reflected in the market prices of RHC stocks, which causes the dividend yields of those stocks to be much lower than they would be in the absence of cellular. They argue that, when these lower yields are used in the DCF formula along with growth estimates that do not reflect the growth that investors were expecting when they paid the higher prices for the stock, the resulting cost of equity is so downwardly-biased as to be meaningless.[133]

90. In support of their position, LECs cite a number of stock analysts' reports attributing 20-25% or more of the value of each RHC's stock to cellular operations. They then argue that, because cellular is relatively new, because cellular revenues are currently small compared with RHC total revenues, and because cellular will require large amounts of new investment over the next several years, investors do not expect a significant cellular contribution to RHC earnings per share (EPS) in the 1990-94 period. The high market valuation of the RHCs' cellular operations must, therefore, be attributable to expected growth beyond the five-year horizon.[134]

91. Expert witness Carleton also argues that the presence within each RHC of a cellular division that is expected to grow at a faster rate than regulated operations violates "as a matter of arithmetic, a critical assumption of the constant growth DCF model (that the firm's overall expected growth rate be constant.)"[135]

92. Pactel offered as evidence of the magnitude of the cellular effect a DCF calculation adjusted to remove cellular impacts. Pactel multiplied the number of in pops its MSAs by a per pop value of $215. This figure amounted to about 50% of the market value of Pactel's stock. Pactel then reduced the current price of its stock by 50% and used the adjusted "non-cellular" price to calculate a new yield figure. This yield (9.7%) was then combined with IBES growth figure from 1986 (before any major speculation about the future of cellular) to produce a DCF estimate of Pactel's cost of equity of 16.7%.[136] Another calculation using a slightly different set of assumptions yielded a cost of equity of 15.7%.

93. Consumer Coalition does not dispute that cellular properties represent a substantial fraction of RHC share prices; that cellular contributed little or nothing to the current earnings of the RHCs in 1989; or that cellular earnings are expected to grow rapidly in the future, and to have a higher growth rate than regulated operations.[137] Consumer Coalition does challenge the assertion that the 5-year IBES forecasts fail to reflect the rapid expected growth of cellular because that growth is going to occur beyond the 5-year time frame.[138]

94. Consumer Coalition's expert witness Miller examined the analysts' reports cited in the LEC Initial Submissions. Miller states that a number of these analysts actually do predict significant cellular contribution to EPS and EPS growth before 1994, and that some of the analysts also predict that cellular growth will be slower beyond 1995.[139] For example, Miller quotes a 1989 Smith Barney research report as stating, "In the early 1990s, however, earned ROEs could rise to the upper teens as cellular profitability explodes and restraints on telephone returns are eased."[140] A 1989 First Boston report on BellSouth is also quoted stating, "We have been assuming that BellSouth's consolidated earnings growth in a three to five year time frame would be about 9%, including two percentage points of growth from cellular."[141] Consumer Coalition argues that this evidence of analysts' predictions undercuts the LECs' assertions about investor expectations.

95. Miller also offers an adjusted DCF estimate for the RHCs as evidence that the cellular effect cannot be as large as the LECs claim. He adjusted the stock price of each RHC downward by the percentage of cellular value attributed by analysts to each company. Using the IBES growth estimates, he then calculated DCF estimates for each RHC. He produced an average cost of equity for all RHCs of 13.5%, which was 150 basis points higher than the 12% average produced with unadjusted stock prices. Miller considered the 13.5% to overstate RHC non-cellular cost of equity because he did not subtract from the growth estimate any of the growth that he contends investors are expecting from cellular in the next five years.

96. In response to Carleton's contention that rapid and nonconstant cellular growth rates necessarily violate the constant-growth assumption of the DCF formula, Consumer Coalition presents a numerical example for a hypothetical RHC showing that constant overall company growth can be consistent with very different growth rates in two different divisions of the company.[142]

97. BellSouth argues that Consumer Coalition's hypothetical is flawed because it depends on an "invalid assumption: i.e., that the growth rate in cellular earnings is *declining* towards the growth rate in total earnings per share."[143] BellSouth argues that analyses of RHC stocks by *Value Line* support the opposite conclusion, that is, that the cellular earnings growth rate will be increasing throughout the 1990s. As an example, BellSouth quotes the following from *Value Line's* January 19, 1990 report on BellSouth:

> Since the company's cellular operations are unlikely to generate sufficient cash flow to justify the current valuation until the second half of the nineties, appreciation potential is subpar within our time horizon.[144]

c. Discussion

98. We are not convinced that the impact of cellular has so distorted our DCF cost of equity estimates for the RHCs that we must simply disregard those estimates as meaningless. We have examined the analysts' reports cited by the parties. We find that, while analysts differ in their assessments of cellular, a number of them do, as Miller indicates, predict significant growth during the 1990-94 period in cellular revenues, cellular earnings per share, and cellular contributions to growth in earnings per share.[145] Contrary to assertions of BellSouth, the *Value Line* analyses that it quotes do not even express opinions about the rate at which RHC cellular earnings are expected to grow. In this regard, we also note that a more recent *Value Line* analysis has this to say about BellSouth:

> Over the next 3 to 5 years, the company's cellular operations should make increased contributions to profits . . . As the number of customers rises, margins should expand. Moreover, operations generate substantial cash that we expect to be utilized to enhance operating performance, including additional overseas ventures.[146]

We conclude from the evidence that the IBES estimates, which represent a consensus of the opinions of analysts who follow RHC stocks, most likely do incorporate at least some element of expected growth from cellular.

99. We reject Carleton's contention that the DCF formula requires that all divisions of a company be expected to grow at the same constant rate. First, as the example provided by Consumer Coalition demonstrates, it is entirely possible for a total company to grow at a constant rate even if it has a division that is growing rapidly and at a changing rate.[147] Second, if this contention were true, then DCF could probably not be applied to many of the S&P 500 firms (as Carleton himself applies it) or to the firms in the USTA comparable firms group.

100. We believe it is possible, however, that RHC stock prices, and particularly the historically high prices that obtained at the end of 1989 and the very beginning of 1990, could reflect investor growth expectations somewhat in excess of the IBES median estimates.[148] It does not follow, however, that we must discard the DCF results for the RHCs. As both Pactel and Consumer Coalition have suggested, it should be possible to adjust the formula inputs to remove the effects of cellular.

101. Pactel's recalculations of its own DCF estimate are implausible. According to Pactel's assumptions about its stock price and percentage of cellular valuation, Pactel's stock would, in the absence of cellular, have been trading at the end of 1989 at a price below the level at which it traded during the third quarter of 1986. This we find highly unlikely, given that the entire stock market rose greatly between 1986 and 1989. Pactel's calculation also implies an equally unlikely non-cellular yield in excess of the current yields on long-term treasury bonds.

102. Miller's adjusted stock prices produce more credible implied non-cellular yields in the range of 6.3%-7.2%. Yields in this range were typical for RHCs at the time of our last prescription, before any cellular effects could have been felt. Miller's adjusted RHC average DCF cost of equity was 150 basis point higher than an unadjusted average starting with the same stock price and using the same dividend and growth estimate. We agree with Miller that his adjusted estimate needs to be reduced somewhat to account for cellular growth that is reflected in the IBES estimate. Based on consideration of all of the analysts' reports contained in the record of this proceeding, we believe it is reasonable to assume that at least 50-75 basis points of the expected growth reflected in the IBES estimates is due to expectations of cellular contributions to growth in the next 5 years. Reducing Miller's adjusted, non-cellular DCF estimates to remove 50-75 basis points of growth attributable to cellular produces non-cellular DCF estimates that are 75-100 basis points higher than his unadjusted estimates. We conclude that the cellular effect described by the RHCs may cause the DCF estimates for the RHCs to be understated by 75-100 basis points at the very most.[149]

9. The Ameritech Legal Objections to DCF

a. Issue

103. The DCF formula assumes that the current market price of a firm's stock equals the present value of the cash flows that investors expect from that stock. The DCF formula discounts to the present value these cash flows to determine the investor's required return or the cost of equity. The cost of equity is then used in determining the rate of return. The authorized rate of return must: (1) "be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital,"[150] and (2) be set so that "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks."[151] Ameritech objects to the Commission's reliance on the use of the DCF formula in determining the cost of equity for interstate access service, asserting, *inter alia*, that such use violates both the capital attraction and comparable earnings standards.

b. Positions

104. Ameritech presents five arguments questioning the legality of our use of the DCF formula in determining the interstate access rate of return. First, Ameritech argues that exclusive reliance on the DCF formula fails to satisfy the *Bluefield-Hope* comparable earnings standard because the DCF-derived result does not provide any information about earnings of comparable risk firms. [152] Second, Ameritech asserts that the Commission's application of the DCF result violates the Court of Appeals decision in *Farmers Union*, which holds that "[the] method of selecting the appropriate rate of return [must be] reasonably related to the method of calculating the rate base".[153] Our procedures violate this principle, according to Ameritech, because they apply a market-required DCF return to a net original cost rate base.[154] Ameritech maintains that to satisfy *Farmers Union*, the market-required return must be translated into a return on book equity or book-required return.[155]

105. Third, Ameritech argues that application of a DCF-derived return to a net original cost rate base violates the capital attraction standard because: (a) the RHC stock prices currently exceed book value by eighty percent; (b) application of the DCF-derived return to a net original cost rate base produces a market price equal to book value; and (c) if the RHC stock price is driven down to book value, there will be a "$78 billion reduction in RHC shareholder value."[156] Moreover, Ameritech argues that the DCF-derived return applied to an original cost rate base is contradictory because investor-expected growth rates of six to seven percent translate into realized growth rates of three percent with RHCs' current 1.8:1 market-to-book ratios.[157] Ameritech also maintains that use of a DCF-derived return with an original cost rate base fails the comparable earnings standard because "comparable risk companies earn far more than the market-required return applied to the book value of their stock."[158] According to Ameritech, comparable risk firms realized returns of 15.5% to 18% on book equity.[159] In Ameritech's view, it also must be allowed to earn such returns if it is to be able to compete for capital with these firms.

106. Fourth, Ameritech points to a number of academic studies challenging the validity of the efficient market hypothesis, a very basic and important underlying premise of the DCF formula.[160] Ameritech contends that this Commission need not resolve the debate surrounding the efficient market hypothesis. It believes, however, that the existence of the debate suggests that this Commission not rely solely on the DCF method for determining the rate of return.[161] Fifth, Ameritech argues that the Commission must adjust the rate of return to account for the disallowance of prudently invested capital from the rate base.[162]

107. Ameritech suggests that this Commission may avoid the legal deficiencies inherent in the use of the DCF formula by reliance on Ameritech's comparable earnings analysis for determining the rate of return for interstate access.[163] Ameritech also suggests that this Commission could avoid legal difficulties with the DCF formula by translating the DCF market-required returns into book required returns.[164]

108. The Consumer Coalition opposes Ameritech's position. The Consumer Coalition disagrees that the DCF formula fails to satisfy *Bluefield/Hope* just because the formula does not provide information about other companies' earnings. It states that the *Bluefield/Hope* standards do not "enshrine any particular approach to cost of equity issues."[165] The Consumer Coalition states that the Supreme Court explicitly held that "other standards [besides the comparable earnings standard] might properly have been employed."[166] Moreover, Consumer Coalition argues, the comparable earnings standard is satisfied when an agency reviews cost of equity information about the companies under their regulation. Consumer Coalition states that the Federal Energy Regulatory Commission (FERC) has repeatedly held that use of the regulated firm's data in the DCF formula is consistent with the comparable earnings standard.[167]

109. Consumer Coalition disagrees that the DCF procedure is faulty because it applies a market return to book data, noting the other RHCs who used the DCF method found no problem with the method.[168] Consumer Coalition contends that Ameritech's real criticism is directed at "any use of the cost of equity capital to set an allowed rate of return."[169] Consumer Coalition explains that a stock price excessively above book value indicates that investors expect the company to earn returns greater than its cost of equity; therefore any regulatory policy which attempts to align allowed returns with cost of equity will have the effect of deflating expectations for returns above the cost of equity.[170] Moreover, Consumer Coalition states that it is "absurd" for Ameritech to state that regulatory authorities must allow returns higher than the required cost of equity just because investors expect the regulated firm to achieve such returns.[171]

110. Consumer Coalition also claims that other factors, besides interstate access, may have contributed to the RHCs' market price exceeding its book value. Consumer Coalition argues that "the return on interstate access services cannot be set for the purpose of maintaining that overall market/book ratio, as Ameritech advocates."[172] and that Ameritech's argument that expected growth will not be realized with a DCF-derived return ignores expected growth from unregulated earnings.

111. In rejecting Ameritech's solution to its market-to-book argument, Consumer Coalition states that adjusting the DCF-derived return to reflect book-required returns would revive the "fair value" concept rejected in *Hope*.[173] Moreover, Consumer Coalition claims that FERC has addressed this very question, and has rejected the use of book value for market prices in the dividend yield term of the DCF formula.[174]

112. Finally, Consumer Coalition states that the efficient market hypothesis is "alive and well".[175] Consumer Coalition acknowledges that some recent academic studies have questioned the hypothesis, but notes that both NYNEX and USTA endorse the efficient market hypothesis. Consumer Coalition says that even Ameritech concedes that these studies need further analysis.[176]

c. Discussion

113. Ameritech's argument that reliance on the DCF formula fails to satisfy the *Bluefield/Hope* comparable earnings standard because it does not provide information about earnings of comparable risk firms is without merit. Ameritech's argument is that a comparable earnings analysis must be used to satisfy the *Bluefield/Hope* standards. This Commission has long rejected that reading of the case law.[177] *Hope* itself states that we are "not bound to the use of any single formula" in determining the rate of return.[178] Our interpretation of the methodological latitude afforded by *Bluefield / Hope* is concurred in by other federal and state regulatory agencies that regularly make use of capital determinations using methods other than comparable earnings analysis.[179]

114. Ameritech's assertion that the DCF methodology violates the *Farmers Union* holding is baseless. The court's objection in that case to FERC's combination of its rate base and rate of return methodology was not based on application of a market-required return to a book value rate base, or *vice-versa*. The *Farmers Union* court objected to FERC's method of determining the cost of equity in computing the oil pipeline industry's overall cost of capital. In determining the weighted average cost of capital for the oil pipeline industry, FERC used book equity returns for several unregulated industries as measures of the cost of equity, and then applied those returns to what FERC purported to be the "equity component" of the rate base.[180] The rate base used by FERC was a "valuation rate base" which included appreciation, not an original cost rate base.[181] However, the "equity component" of that rate base included all the appreciation; none was attributed to the debt component of the rate base.[182] It was this inconsistency, and the result that it produced, that the court found to be unreasonable.[183] Thus, *Farmers Union* is inapposite to the issues raised by Ameritech in the instant proceeding.

115. Ameritech's third argument amounts to a suggestion that we are obligated to prescribe a rate of return that will ensure continuation of the carriers' current market-to-book ratios. We reject this suggestion for several reasons. First, the Commission has previously rejected the position that our obligation in rate of return proceedings is to ensure a particular market to book ratio.[184] Ameritech cites no court or regulatory agency decision in support of the obligation that it attributes to this Commission. Indeed, given the variety of factors that investors consider in establishing the price of stock, it is doubtful that we could implement any rate of return regulatory scheme that accomplished Ameritech's goal that is consistent with the requirement that rates be just and reasonable. Moreover, market-to-book ratios greater than one have been viewed traditionally as possible indicators that the company's return is greater than its required return. The high market-to-book ratios that the RHCs enjoy today are probably related to their nonregulated activities and tell us little about the required return on interstate access services.

116. Ameritech places great reliance on its perception that unless this Commission applies the market-derived rate of return to its equity base, stockholders will see a massive decline in the value of their stock.[185] It is true that prescription of a rate of return based on market data could lead to a decrease in the value of the stock if investors had been expecting continuation of a previously-authorized higher rate of return. On the other hand, a

reduced rate of return might have no impact on stock price if, as often happens, the reduction had already been anticipated and discounted by the market. In any case, the requirement that we balance ratepayer and investor interests does not allow us to insulate investors from a diminution in the value of their stock (if in fact we could do so). In any event, if we prescribed a rate of return above that which market data showed to be reasonable, investors would increase their expectations as to the carrier's rate of return, market value would increase, and the carrier would seek a higher rate of return authorization so that these higher expectations are not thwarted.[186] We would be remiss in our responsibilities to balance ratepayers' and investors' interests if we implemented procedures that effectively insulated a carrier from experiencing a decrease in its authorized rate of return.[187] Thus, our current market-based rate of return procedures meet the *Bluefield / Hope* criteria notwithstanding that their application herein may adversely impact carriers' high market-to-book stock ratios.

117. Moreover, Ameritech's desire that we prevent the market price from declining towards the book value would require that we validate the current market valuation of the RHCs. This argument essentially states that investors are entitled to earn their expected return on all shareholder investment in the company's stock rather than earning a return on capital invested in the regulated company. We agree with Consumer Coalition that Ameritech's position attempts to revive the "fair value" principle of ratemaking discredited by *Hope*.[188] The Commission long ago rejected the "fair value" principle for determining rate base,[189] and we have likewise declined to regulate carriers on a "balance sheet" method.[190] In short, our ratemaking procedures are based on traditional regulatory practices, have been recognized by investors as the established methods, and provide a full opportunity for carriers to earn a rate of return that meets the *Bluefield/Hope* standards.

118. We accord little weight to Ameritech's attack on the efficient market hypothesis. Although Ameritech cites various scholarly articles in support of its position, its own expert, Dr. Charles Phillips, states that "[t]hese studies are relatively recent and their central thesis must be subjected to further analysis and testing."[191] We note that no other party questions the fundamental soundness of market-based approaches to determining the cost of capital. Ameritech offers no data that discourage us from placing primary reliance on such methodologies in this proceeding.[192]

119. Ameritech's argument that we must adjust the rate of return to account for rate base "disallowances" of prudently invested capital is presented only in general terms. Notably, Ameritech neither identifies any disallowance that must be compensated for in the rate of return calculation nor estimates the aggregate size of these disallowances.

120. Moreover, contrary to Ameritech's position, we are not required to allow a return on all prudently invested capital. *See Duquesne Light Co. v. Barasch*, 109 S.Ct. 609 (1989). Rather, we must assure only that the "end result" of our ratemaking decisions is not confiscatory.[193] *Id.*, 109 S.Ct. at 618-19. Nothing in the Constitution or in the Communications Act requires the agency to adjust the prescribed rate of return to take into account the agency's policies regarding rate base disallowances. Rather, the methodologies we employ to determine the appropriate rate of return already take into account the FCC's approach to such disallowances. Investors are presumably aware of our ratemaking procedures, including our treatment of plant that is not automatically included in the rate base, and take these procedures into account in establishing the price of the stock.[194] The risk of disallowance, including the disallowance of prudent investment, is one of many factors that investors consider in evaluating the riskiness of investment in a regulated enterprise. Thus, the rate of return prescription itself already takes into account the fact that the FCC generally disallows prudent investments that are not "used and useful" in providing service.

10. Other DCF Calculations for RHCs

a. Southwestern Bell Multi-Growth Model

i. Description

121. SWB's witnesses, Avera-Fairchild, criticize the classic DCF model for having only a single growth estimate. They argue that a more general DCF model, with several growth terms, would more accurately estimate SWB's cost of equity capital. In their DCF multi-stage growth model of SWB, they assume that earnings per share grow at an 8.5% to 9% rate until SWB's return on equity has risen from its 1989 level of 12.64% to 15.5%. Once a 15.5% return on equity is achieved (five years), the growth in earnings per share then drops to a constant 5.12% and the return on equity is 15.5% for the rest of the model. SWB's price per share is assumed to grow 16.75% per year for the first five years, and 9% a year thereafter. Dividends are assumed to be two/thirds of earnings. The 1989 dividend is $2.60 and the 2009 dividend is projected to be $7.89. The 1989 share price is $57.12 and the 2009 projected price is $453.28. Avera-Fairchild take the dividends expected between 1990 and 2009, plus the expected SWB stock price in 2009 and solve for the rate of return that makes the present value of these cash flows equal to SWB's current stock price. SWB concludes that its cost of equity capital is between 14.5% and 15.5%.[195]

ii. Positions of the Parties

122. Texas OPUC's witness, Szerszen, contends that stock price growth must ultimately be linked to earnings and dividend growth, and that it is inconsistent with fundamental financial principles to project a stock price growing twice as fast as earnings (10.88% versus 5.81%) for the next twenty years. The Consumer Coalition's witness, Miller, observes that Avera-Fairchild's projections require that SWB's stock sell for 30 times earnings in 2009. Szerszen argues that it is unreasonable to project the price of a stock on the basis of the 14.43% difference in the 1984-89 growth rate of US Treasury bond prices and SWB's stock price, and a projection of future US Treasury bond price increases.[196]

123. SWB responds that the multi-stage growth DCF model is more flexible than the single-stage growth DCF and that Avera-Fairchild's assumptions are based on reasonable projections of SWB's current performance.[197]

iii. Discussion

124. The validity of a cost of equity estimate made with any form of DCF model rests upon the validity of its inputs. We agree with Szerszen and Miller that assumptions underlying the SWB multi-stage growth DCF es-

timate are implausible. We particularly do not believe that SWB's share price will grow twice as fast as its earnings for twenty years, or that SWB's shares will trade at 30 times earnings at the end of that period. Accordingly, we cannot assign significant weight to SWB's cost of equity estimate.

b. Non-LEC Studies

i. Description

125. Copeland (Colorado Consumer Counsel) estimated the cost of equity capital for the RHCs using a single growth rate DCF formula. He estimated the average RHC expected dividend yield as 4.9%, and the average long term growth rate, using both IBES and Value Line estimates) of 7.1%. He found that the average RHC cost of equity capital was 12.0%. He gave less weight to his CAPM estimate for the RHCs of 13% and concluded that the appropriate return on equity is not above 12.5%.[198]

126. Clinger (Florida Citizens) estimated the cost of equity capital for an Index of Telephone Holding Companies using a DCF formula that divided the growth component into a medium term and long term component. Based upon financial data from Value Line's Investment Survey, he estimated the medium term growth rate was between 8.0% and 8.7% and the long term growth rate was between 5.3% and 6.8%. He used the current dividend yield without adjustment for growth as his estimate of the expected dividend yield. His cost of equity estimates for the Index of Telephone Holding Companies ranged from 10.5% (Sept., 1989) to 12.2% (March, 1990).[199]

127. Johnson's (Indiana/Ohio CC) DCF estimate bases the expected dividend yield on Ameritech's current (unadjusted for growth) dividend yield and the long term growth rate on his own review of Ameritech's historic growth rate and investor expectations. He concludes that Ameritech's cost of equity, including a flotation cost allowance, is in the range of 11.2% to 12.7%.[200]

128. Kahal (Pennsylvania OCA) estimates the cost of equity capital for the seven RHCs using a single growth rate DCF formula. He relied on several sources for long term growth rates besides IBES. He concludes that the cost of equity capital for the RHCs is in the range 11.0% to 12.0%.[201]

129. Klein (Tennessee PSC) used a single growth rate DCF formula to estimate RHC cost of equity capital. He relied upon Value Line projections of dividends and the dividend growth rates. He concludes that the RHCs have a cost of equity capital in the range from 12.15% to 12.3%.[202]

130. Marcus and Miller (Consumer Coalition) used a single growth DCF formula and found the average cost of equity for the RHCs is 11.74% (4th Qtr, 1989) and 11.92% (March 9, 1990).[203]

ii. Positions of the Parties

131. The LECs generally object to the use of the RHCs as surrogates for interstate access and the classic DCF formulation of the DCF model. (*See* Objections to Use of RHCs as Surrogates, and DCF Specification Issues, above) Siegel (US West) argues that Copeland's cost of equity estimate is unreasonably low compared to current corporate bond yields. BellSouth argues that Clinger assumes the RHC long term growth rate is lower than the short term growth rate while Value Line, a data source Clinger relied upon, forecasts improving long term prospects. Carleton (BellSouth) argues that Clinger's two stage growth model is unjustified because he has not established that investors expect a downward shift in telephone earnings growth rates in the long term.[204]

iii. Discussion

132. We discuss elsewhere LEC objections to the use of the RHCs as surrogates for interstate access and to the classic DCF formula. The DCF analyses described above represent a number of variations on the classic DCF formula and yield cost of equity estimates in the range of, or somewhat lower than, the classic formula. None appear to offer a significant advantage over the classic formulation.

11. Risk Premium Analyses

a. Description of Method

133. The general methodology used by all risk premium analyses is to estimate the cost of equity capital as the current bond yield plus a historically determined equity risk premium. A bond's yield is simply the discount (interest) rate that makes the present value of its contractual cash flow equal to its market price. Since the cash flows are fixed, if the bond goes up in price, the yield must go down. An increase in the price of a stock, however, may leave the stock's expected return unchanged if the price rose to adjust for higher anticipated profits rather than lower investor perceived risk. Risk premium analyses solve this problem by comparing the past returns (capital gains, dividends and interest, divided by the market price) on stocks and bonds. The historic premium in return on stocks over bonds is assumed to be a stable and accurate forecast of investor's expectations about the future premium.

134. The capital asset pricing model (CAPM) is a risk premium methodology which uses a risk premium based upon the difference in returns on a nearly risk free bond and the overall stock market. To estimate the cost of equity for a particular company, it uses the variance of the company's stock price relative to the market as a whole (beta) to adjust the premium. The CAPM formula relating risk and return is:

COE = RF + (beta * RP), where,

COE is the cost of equity estimate,

RF is the current yield on very low risk debt,

RP is the analyst's estimate of the difference in return between the return on low risk debt and stocks, and

Beta is an estimate of the difference in risk of the stock for which the cost of equity estimate is being made and the overall risk of stock market investments.

b. CAPM Studies

135. Five CAPM analyses (4 by LECs and 1 by an opposing party) and one traditional risk premium analysis have been submitted in this proceeding. Taking the CAPM analyses first, the LECs' studies generally used risk

premiums of 7% for their cost of equity estimates: Siegel (US West) uses a risk premium of 7.5%. Linke (Ameritech), 7.4% to 7.6%; USTA, 6.9%; and Avera and Fairchild (Southwestern Bell), 5.6% to 7.4%. Klein (Tennessee PSC), used a risk premium of 6.0% to 6.5%. The range of betas is also small: Siegel finds an average Beta of 1.0 for his group of 33 comparable firms; Linke, finds an average beta of 0.91 for his 500 mimicking portfolios analysis (see below, Other Cost of Equity Showing); USTA's cluster group has an average beta of 1.13; Avera-Fairchild uses a beta of 0.95 for Southwestern Bell; and Klein uses an average RHC beta of 0.92. Based upon these risk premiums and betas, and using current bond yields, Siegel found a cost of equity capital of 15.93%; Linke, 15.5%-15.7%; USTA, 15.73%; Avera-Fairchild, 13.69%-15.4%; and Klein, 13.27%-13.98%.[205]

c. Positions of Parties

136. Miller (Consumer Coalition) argues that the risk premiums assumed by the above studies are far higher than used by analysts elsewhere. He contends that the Wall Street analyst reports, relied upon by the RHCs to support their positions on other issues, use much smaller risk premiums, ranging from 2.0% to 5.4%. Furthermore, Miller notes, the Ibbotson Yearbook, the source the LECs cite for their risk premiums, shows risk premiums varying widely with the historical period chosen: 3.42% for 1980-89, 2.31% for 1970-79, 7.99% for 1960-69, 19.38% for 1950-59, and 3.47% for 1937-49. He argues that the LECs' 1926-89 average premium is no more defensible an estimate of investor's 1990 risk premium expectations than the 1980-89 average risk premium. He contends that the Federal Energy Regulatory Commission (FERC) has repeatedly considered and rejected historical risk premiums as overstating the actual risk premium:

> . . . (T)he use of an equity risk premium which is based upon an extended historical period, as is the case with the Ibbotson-Sinquefield study, can not be accepted at face value. [FERC Generic Determination of Rate of Return on Common Equity for Public Utilities, 50 Fed. Reg. at 21821]

> There are good reasons to question the stability of long-run risk premiums, especially as applied to recent years. . . . (R)isk premiums . . . calculated over a sixty year historical period . . . are suspect . . . (and) probably somewhat overstated . . . [FERC Generic, 53 Fed. Reg. at 3355].[206]

137. The LECs respond that risk premiums should be the average of the longest period possible (1926-89) and that risk premiums based upon more recent periods do not explicitly incorporate events such as the Great Depression.[207]

138. Miller also questions the LEC choice of *Value Line* betas for the RHCs. He contends that the average RHC beta estimate from other Wall Street sources are significantly lower: 0.81 (IBES), 0.80 (Duff & Phelps), 0.76 (Merrill Lynch), 0.71 (First Boston, citing Barra), and 0.71 (Morgan Stanley). NYNEX argues that *Value Line's* beta estimates are superior because they are formulated with 5 years of weekly data while Merrill Lynch uses five years of monthly data and IBES uses 25 weeks of weekly data. Siegel states that he used S&P betas for his comparable firms analysis because S&P uses the classic formulation for the implementation of the CAPM. He argues against the Barra method of calculating a forecast beta because of its complexity.[208]

d. Discussion

139. We continue to believe that the CAPM approach has the potential to provide estimates of the cost of equity capital with the same reliability as the DCF approach. The fault with the CAPM estimates submitted in this proceeding lies with their unrealistically high betas and risk premiums. *ValueLine* betas are betas which have been adjusted so as to raise the level of betas less than one and lower the level of betas greater than one. While such adjusted betas undoubtedly have their uses, we do not believe use of an adjusted beta is consistent with the theory of CAPM. We agree with Consumer Coalition that the LECs' risk premiums appear to be much higher than those used by many of the analysts whose reports appear in the Rule Making record herein. The inflated risk premiums produced by studies covering extended historical periods have been a major barrier to the acceptance of CAPM by regulators. Indeed, we know of no state or federal regulatory commission that has prescribed a return on equity based primarily on a CAPM estimate incorporating such risk premiums. We conclude that these CAPM estimates are likely to overstate the cost of equity capital, and that no weight should be given to them.

12. Comparable Firms Studies

a. S & P 500 and S & P 400

i. Description

140. Several LECs and USTA propose the use of either the Standard & Poor's 500 or S&P 400 Industrials as a comparable firm grouping. The S&P 400 consists of approximately 400 of the largest industrial companies. Its composition changes over time due to mergers, leveraged buyouts, and failures. Currently the S&P 400 has 388 companies. The S&P 500 includes the S&P 400 plus the S&P 40 Utilities (which includes the RHCs), the S&P 40 financial companies, and the S&P 20 transportation companies.

141. BellSouth's and NYNEX's expert, Carleton, averaged (weighted by market value) the DCF equity estimates of all the companies in the S&P 500 for which estimates could be made for the months between September 1989 through January 1990. The average ranged from 14.6% to 15.0%. His recommendation is the average of this range: 14.8%.[209]

142. Bell Atlantic's expert, Vander Weide, compares the investment return (capital gains and dividends) from a portfolio of S&P 500 stocks, bought in proportion to their market value, to the return (capital gains and interest) from buying A-rated utility bonds. He averages the difference in the returns over the period 1937 to 1989 and finds that the S&P 500 return exceeded the return on A-rated utility bonds by 6%. Adding this 6% to the interest-only return on A-rated utility bonds, he determines that the current cost of equity capital for the S&P 500 is 15.44%. He concludes that this result supports the reasonableness of the 14.92% (DCF) result of the USTA cluster analysis.[210]

143. USTA, with the support of all the LECs, proposed to use the average (weighted by market value) of the cost of equity estimates of the companies in the S&P 400 as an alternative benchmark to its cluster analysis group. Based upon the S&P 400 it found cost of equity estimates of 15.51% using a DCF formula, 15.31% using the CAPM method, and 15.96% using historical earned returns.[211]

ii. Positions of the Parties

144. BellSouth and NYNEX support their use of the S&P 500 with the assertion that the risks of interstate access are at least as large as that of the average unregulated company and that the S&P 500 is representative of the stock market as a whole. Bell Atlantic asserts that because the S&P 500 is a group of large industrial firms, it is an excellent benchmark for determining the interstate access cost of equity and can be used to verify the reasonableness of the results of the USTA cluster analysis. USTA argues that the S&P 400 is a proxy for the competitive marketplace.[212]

145. The Consumer Coalition contends the LEC and USTA position that the S&P 500 and S&P 400 represent the stock market as a whole says nothing useful about the cost of equity for interstate access. The witnesses for Florida Citizens, West Virginia CA, and GSA all argue that interstate access is far less risky than the stock market as a whole. Clinger (GSA) asserts that the LECs' AAA and AA credit ratings (Moodys) indicate that they are less risky than 90% of industrial firms. He argues that, given the LECs are less risky than the RHCs, then the RHCs' *Value Line* Safety Ratings show that the LECs are less risky than 91% of the firms followed by Value Line.[213]

b. Phillips (Ameritech)

i. Description

146. Ameritech's witness, Phillips, uses four independent telephone companies as the starting point of his analysis: ALLTel, Cincinnati Bell, Rochester Telephone and SNET. He states that investor perceptions of risk can be identified and isolated by three criteria: *Value Line* beta (a proprietary measure of stock price variability), *Value Line* safety rating (a proprietary statistic that reflects a large number of factors, including financial condition, leverage, business risk, size, management competence, price stability, accounting methods, and fixed charge coverage), and S&P bond grade (a proprietary rating of the default risk). After identifying the criteria range of the four independent telephone companies, he selected 17 companies which fall within the same range. Phillips based his cost of equity estimate on the average earned return on equity of the 17 companies over the period 1984-89. He concludes that the target cost of equity should be set at 18%, and that the lowest reasonable cost of equity is 15.5%.[214]

ii. Positions of the Parties

147. The Indiana/Ohio CC witness, Johnson, contends that the Phillips' criteria selects for high profitability as much as for low risk. He argues that risky, but highly profitable, companies can have high bond ratings. Johnson cites as evidence of this high risk/high profit problem the fact that Phillips selected companies such as General Dynamics, a defense contractor with earned returns varying from - 4.8% to 32.9%, Merck & Co, a drug manufacturer with earned returns ranging from a low of 19.8% in 1984 to 48.5% in 1988 and 46.9% in 1989, and IBM, a computer manufacturer, with earned returns from 9.6% to 26.5%.[215]

148. Phillips argues that his criteria are widely used by the investment community and by the other parties to this proceeding.[216]

c. Siegel (US West)

i. Description

149. US West's expert, Siegel, selects the operating companies of the RHCs and GTE to represent the LEC industry. He notes that these companies are the largest of the 1400 companies in the industry, but argues that accurate data is not readily available for the others. He analyzed the ratio of cash flow to assets, ratio of assets to sales and total assets of the operating companies. Siegel then attempted to select a group of nonregulated companies that fell within the operating companies' range for the three variables. His initial analysis found no companies within the range of all three criteria. He changed the ranges of the first two criteria. The range for cash flow was expanded from a range of 11.7%-19.9% to 12%-22%. The range for assets to sales was expanded from 1.78-2.45 to 1.3-4.0. He found 33 companies that satisfied his criteria. To develop a cost of equity estimate, Siegel applied the CAPM method to the average (market value weighted) beta for his group. Using a beta of 1 and a risk premium of 7.5%, he concludes that the cost of equity capital is 15.9%.[217]

ii. Positions of the Parties

150. The Consumer Coalition asserts that two of Siegel's criteria (cash flow ratio and total assets) were also used by USTA and that the criticisms directed at their usage by USTA also apply here. (*See* USTA Cluster Analysis, Positions of the Parties, below.) The Consumer Coalition's witness, Miller, argues that profits are a component of cash flow and that, given the high cash flow ratios of the BOCs, Siegel's use of this ratio as a criteria selects highly profitable companies rather than low risk companies. US West denies this is the case and argues that the cash flow ratio was used in conjunction with other criteria.[218]

151. The Consumer Coalition also contends that the wide range of the betas for the companies in Siegel's group (.15 to 1.59) indicates that Siegel's criteria have not identified a group of similar risk companies. Miller, using Siegel's CAPM formula and discarding the highest and lowest betas, finds the cost of equity estimates for Siegel's comparable firms group ranges from 13.46% to 19.46%. He argues that either Siegel's group does not consist of risk comparable companies or that the CAPM formula gives widely differing results for supposedly comparable companies. Siegel responds that he used the average (weighted by net assets) beta, not the individual company betas, to estimate the cost of equity capital. He argues that he deliberately avoided using beta as a criteria to prevent a foregone conclusion in the final results, and that his group of comparable firms represent a well diversified portfolio of companies with similar operating characteristics to the BOCs (as measured by his criteria).[219]

d. USTA Cluster Analysis

i. Description

152. USTA used a weighted average composite of the operating companies of the RHCs (BOCs) as the starting point of its analysis. Five criteria were used to select a group of comparable firms: operating income variability, sales growth, debt ratio, firm size, and the ratio of cash flow to assets. Using a cluster analysis procedure to order companies by the criteria, USTA selected the 20 companies that were closest to the average of the BOCs. The cost of equity capital for each company was estimated using DCF and CAPM methodologies, and the simple average of earned returns on equity for the previous four years. The average (unweighted) estimate for the twenty companies was 14.75% (DCF), 15.73% (CAPM), 18.25% (1985-88 earned returns), and 19.65% (1986-89 earned returns). USTA's recommendation is that the cost of equity capital be set within the range 14.75% to 18.25%.[220]

ii. Positions of the Parties

153. GSA's witness, Winter, characterizes USTA's cluster analysis as being a mechanistic, computerized search through a list of several hundred firms based upon a few user specified criteria. For the results of such a search to be valid, he argues, the selection criteria's relative risk rankings for the LECs and the selected firms must be consistent with the market's perceptions. He notes that, while only one of the cluster companies has a AAA bond rating and more than half have ratings of A or lower, nine of the twenty-one BOCs are rated AAA and ten more are rated AA. The *Value Line* (adjusted) betas of the cluster group range from .95 to 1.40 and average 1.13, while the average for the RHCs is only .92. He states that although all the BOCs have Value Line Safety ratings of one, only five of the twenty cluster companies have ratings of 1, and ten have ratings of 3. Maryland PC and Pennsylvania OCA's witness, Kahal, raised similar criticisms.[221]

154. The Consumer Coalition's witness, Miller, also finds that the risk characteristics of the USTA cluster group does not match those of USTA's BOC target group. He notes that, measured by each of USTA's criteria, the cluster group moves only a fraction of the way from the average for the population of 628 firms from which USTA drew its sample towards the BOCs. Taking all the criteria together, the cluster group is less than two-thirds of the way between the BOCs and the total population.[222]

155. Miller argues that the wide range of DCF cost of equity estimates (11.3% to 18.07%) indicates that USTA's cluster analysis has not succeeded in identifying similar risk firms. He observes that virtually the same proportion of the cluster group (6 of 20) and the total population (200 out of 628) fall within 1% of the cluster mean of 14.75%. Comparing the cluster group to a group of electric utilities, he finds that, without any selection or screening, half of the DCF estimates for all 111 electric utility companies listed by Compustat fall within a 143 basis point range (9.97% to 10.4%), while USTA's cluster group needs a 290 basis point range (13.52% to 16.42%) to contain 10 of 20 companies. Compared to the RHCs, the range of DCF estimates for the seven RHCs is 1.01% (11.28% to 12.29%) versus 6.77% for the USTA cluster group. He argues that the electric utility and RHC groups demonstrate that there is a strong central tendency, or clustering, of estimates for groups that have similar risks, but that USTA's cluster companies do not exhibit it.

156. Miller also criticizes USTA's criteria. He contends that prospective variability is what drives investment risk, but that only one of USTA's criteria, operating income variability, directly attempts to measure variability. Furthermore, he argues, USTA's method of measuring operating income variability is suspect. USTA uses deviations from a linear growth trend, instead of a more standard measure such as the variability in the realized percentage rate of return. He contends that USTA was measuring the non-linearity of income and not the unpredictability that concerns investors. USTA's cash flow to assets criterion, he argues, is more a selector of highly profitable rather than low risk companies, and USTA's firm size (total assets) criteria is simply an artifact of the way in which the BOCs were incorporated. The Consumer Coalition asserts that Bell Atlantic's Response to Discovery did not cite a single investment advisory report which has employed or discussed the USTA risk criteria.[223]

157. Miller argues that USTA's criteria are only weakly related to investor required returns. Using USTA's total population of companies, he compared each of USTA's criteria with USTA's DCF estimate of the cost of equity capital. He finds that sales growth and firm size have a significant correlation with the cost of equity, operating income correlation is only marginally so, and the cash flow and debt ratio correlation are insignificant. Moreover, three of the criteria (operating income variability, cash flow, and debt) have correlation relationships that are the opposite of what USTA's expert, Vander Weide, assumed, *e.g.* a higher cash flow to assets ratio is associated with a higher DCF cost of equity, but USTA's analysis depends upon a high cash flow ratio selecting a safe company with an appropriately low cost of equity. The strongest correlation is between sales growth and the DCF, but Miller questions whether differences in sales growth rates as low as the BOCs' translate into meaningful differences in company risks.[224]

158. Vander Weide responds that the USTA cluster group, measured by USTA's five criteria, is closer to the BOCs than to the population mean. He argues that Miller's criteria by criteria examination is misleading because "[i]t is a mathematical certainty that the cluster analysis will identify the twenty firms which are most similar to the target based upon the combination of the five indicia, not the indicia taken individually." He asserts that Miller's correlation analysis did not take into account the non-linear nature of the relationship between the criteria and the cost of equity capital. He cites as examples that many firms use low debt ratios to offset high operating risk and that high sales growth rates may be risky for firms in the early stages of their life cycle, but low or negative sales growth rates can be risky too. He argues that Miller only claims rather than proves that the cash flow criteria can select for high profits as much as for low risk. He contends that the criteria are basic measures of risk that no financial analyst would ignore.[225]

159. Vander Weide asserts that Miller, Winter, and Kahal are incorrect to examine the individual companies in the USTA cluster group. He argues that the firm-specific anomalies average out over the twenty firms. Furthermore, he observes, the standard deviation of the DCF estimates for the cluster is half that of the entire population (2% versus 4%). Vander Weide argues that the RHC-

USTA cluster company comparisons of Winter, Kahal, and Maryland PC are meaningless because the BOCs were the target of the USTA cluster analysis.[226]

160. A number of other parties raised objections to the USTA cluster analysis. Tennessee PSC's witness, Klein, argues that financial theory does not support simply adding together criteria with interrelationships that are complex and that change as the values of the criteria change. Vander Weide responds that the criteria can be added together because they were carefully selected so as not to overlap. Klein also leveled the general criticism that, while regulated companies endure, the nonregulated companies appearing to be comparable today may not meet the comparability criteria a few months from now. Vander Weide asserts that the turnover in comparable firms is the result of the normal workings of the marketplace. Maryland PC states that the operating income variability criteria produces erroneous results for at least Bell Atlantic. Maryland states that the income variability of Bell Atlantic's telephone subsidiaries during the period used by USTA is due solely to the rate reductions made to reflect the lowering of federal income tax rates.[227]

e. Discussion

161. The criticisms of the comparable firms analyses have focused upon the selection criteria and upon the selected firms.[228] The ideal selection criteria logically and unambiguously mirror investors' perceptions of the risk of stock ownership in any company. Among the criticisms that can be made of a criterion are that it is more reflective of bondholder than stockholder risk perceptions, that its interpretation depends upon the particular circumstances surrounding each company, and that it selects more for high profitability rather than low risk. The ideal comparable firms group should form a cohesive group with a consistent level of risk closely matching that of the target group. The Commission's experience with comparable firms analysis in the *1986 Represcription Proceeding* was that even carefully specified lists of selection criteria can result in groups of firms that have very dissimilar cost of equity capital estimates.

162. The comparable firms analyses which chose the S&P 400 and S&P 500 offer only the general rationale that interstate access service is at least as risky as the entire stock market. A number of parties contend that interstate access is less risky than the market, and argue that choosing the whole stock market as a comparable firms group is not a revealing analysis. We simply do not believe that interstate access, which is a regulated monopoly business, is as risky as the average publicly-traded firm. We therefore give no weight to analyses that suggest that the average or median cost of equity for the S&P 400 or 500 should be adopted as the interstate access return on equity. On the other hand, we do accept that the range of companies in groups such as the S&P 400 covers the broad dimensions of investor perceptions of the trade-off between risk and return. As discussed in Part III.B.4. above, we give significant weight to the S&P 400 as a source of benchmarks for investor required returns.

163. The parties have criticized Phillips' selection criteria as biased towards choosing high profit and high risk companies. There is no question that a number of the companies Phillips selected have earned extremely high returns: Coca-Cola's 1989 earned return on equity was 37.6% and its 1984-89 average was 28.7%. Merck's 1989 earned return was 46.9% and its average was 33.5%. The range of the earned returns for some of Phillips' companies also appears to be inconsistent with the return range the LECs have experienced: -4.8% to 32.9% for General Dynamics, and 0.0% to 38.0% for Colgate-Palmolive. We also note that Phillips' average cost of equity estimate of 18% is at the upper end of the range of recommendations made by other parties and that it is barely exceeded by the 18.5% median cost of equity estimate for the top quartile of the S&P 400 (DCF, July 1990). We conclude that it is unlikely that the cost of equity capital for interstate access is this high and that no weight should be given Phillip's recommended cost of equity.[229]

164. Siegel's comparable firms analysis has also been criticized. Various parties contend that his cash flow selection criterion is biased towards highly profitable companies, that his firm size criterion gives significance to the irrelevant history of how the LECs chose to divide up their operations into subsidiaries, and that the extremely large range of betas for the selected companies indicates that he has not identified companies with similar risks. Siegel denies that the cash flow criteria is biased and responds to the beta analysis by arguing that he only used the group average beta in making his cost of equity estimate. We do not believe that averaging nullifies the criticism. We note that only 42 of the S&P 400 have betas higher or lower than the .63 to 1.47 range for Siegel's group (discarding the highest and lowest betas in his group). Taking an average of such a widely dispersed group of companies, even a weighted average, predictably produces a number very close to the average of the S&P 400 itself. The beta of his group is one and the beta for the whole stock market, since it is defined as the variance relative to the whole market, is also one. We conclude that the results of Siegel's analysis amount to little more than an estimate of the average cost of equity for the stock market taken as a whole. Accordingly, we assign it no weight.[230]

165. USTA's cluster analysis comes under similar criticism. A number of parties argue that USTA's selection criteria have ambiguous or weak relationships to risk, and that some select for high profits as much as low risk. They also contend that the companies in USTA's cluster group are so diverse in risk and return that they are neither comparable to each other nor to the BOCs. Bell Atlantic's witness, Vander Weide, responds that the criticisms of individual criteria and companies are irrelevant because USTA used the average of its criteria to select companies, and the average of the companies as its estimate of the cost of equity. Vander Weide contends that the five criteria, taken together, are an excellent indication of risk. He also argues that the companies in a comparable firms analysis only have to be on average comparable to the target group. Tennessee PSC's witness, Klein, responds that nothing in financial theory supports adding together such complex indicia.

166. We are hard pressed to accept Vander Weide's contentions that weaknesses observed in the piece parts of an analysis do not weaken the credibility of the result. USTA has not demonstrated that its criteria accurately portray all the relevant dimensions of risk. We agree with the Consumer Coalition, several states, and GSA that the companies in USTA's cluster group appear to have diverse risks and costs of equity, and that few seem comparable to the BOCs in either respect. Furthermore, we note the comparison between USTA's average cost of

equity estimates (14.75% to 19.65%) and the median DCF estimates (December, 1989) for the top two quartiles of the S&P 400 (15.8% and 18.2%). USTA's analysis does not constitute a persuasive case that the cost of equity to support the LECs' interstate access activities is perceived by investors as being far riskier than the bulk of the business activities conducted by the S&P 400. We assign no weight to USTA's recommendations for the cost of equity capital.[231]

13. Other Cost of Equity Showings

a. Description

167. Four showings use historical earned returns as estimates of the cost of equity. Phillips (Ameritech) and USTA adopt an average of 1984-88 earned returns. Phillips notes that this period was unrepresentative because it did not contain an economic recession. He compares the earned returns for the periods 1981-83 and 1984-88 and found them similar. Johnson (Indiana/Ohio CC) compares the earned returns over the period 1979-88 of nonregulated companies (the S&P 400, the Federal Trade Commission's "All Manufacturers", and the industries monitored by Business Week), the telephone industry (AT&T, the independent telephone industry, and the RHCs), and energy utilities (Moody's 24 electric utilities and gas distribution group). Winter (GSA) finds that the average earned return of the large corporations covered by Business Week for the period 1985-89 (12.2%), is the maximum cost of equity capital for the RHCs.[232]

b. Positions of the Parties

168. Clinger (Florida's Citizens) rejects earned returns because they only indirectly represent investor expectations (which define the cost of capital) and then only over extended periods of time. Johnson (Indiana/Ohio) argues that the period 1984-88 focuses on the highest returns earned during the expansionary phase of this business cycle. He suggests that the returns from this period overstate the long run sustainable returns earned by unregulated firms over the full course of the business cycle. PacTel characterizes historic earned returns as objective measures and useful bench marks.[233]

c. Discussion

169. We do not believe that an average of the past earned returns of groups of nonregulated companies is an acceptable method of developing a forward looking estimate of the cost of equity capital required by investors in interstate regulated telephone service. Market expectations often diverge significantly from historic trends. This is especially true at the present time, when we have just passed through a period of exceptionally high corporate earnings. We give no weight to cost of capital estimates based upon past earned returns.

14. Interest Rates

a. Issue

170. In 1986, the time of our first represcription, interest rates were in the range of 5.9% on one year treasury notes and 7.3% on thirty year treasury bonds. Interest rates as of June, 1990 were in the range of 8.0% on one year treasury notes and 8.4% on thirty year treasury bonds. The parties debate whether this increase in interest rates since 1986 mandates an increase in our prescribed rate of return.

b. Positions

171. The LECs claim that the Commission recognized a relationship between interest rates and the cost of equity capital in the *1986 Represcription Proceeding* and in extensions of the 12% rate of return prescribed therein.[234] They argue that the increase in interest rates since 1986 requires a higher rate of return.[235]

172. Consumer Coalition argues that the Commission's *1986 Represcription Proceeding* rejected the view that the cost of equity moves in lockstep with interest rates.[236] Moreover, Consumer Coalition contends, the Commission's focus in that proceeding was on financial conditions in the two years preceding March, 1986, when interest rates were far higher than they were in 1986 or are now.[237]

c. Discussion

173. We believe that the Consumer Coalition has correctly characterized the Commission's position in the *1986 Represcription Order*. A graph depicting average interest rates for the period Jan. 1984-July 1990 for (1) 10 year Treasury bonds and (2) Aa Utility bonds appears in Appendix H.[238] This graph demonstrates that the 1986 prescription took place at the very end of a two-year decline in interest rates, during which interest rates went from record high levels to the lowest levels of the decade. Since 1986, a very different picture has emerged: rates rose in 1987, but have remained comparatively stable ever since. Our 1986 prescription was explicitly not based upon a risk premium method, and thus was not in any way calculated using the 7% Treasury bond rates or the 9% Utility bond rates that prevailed that year.[239] There is thus no basis for the LEC position that we must maintain the risk premiums that would be derived from a comparison of 1986 interest rates with the 14.2% return on equity implicit in our 12% prescription.

C. Cost of Equity: Conclusions

174. In the Docket 84-800 Rule Making the Commission adopted DCF as its primary rate of return methodology. It determined that, in future LEC represcription proceedings, the DCF method should be used to estimate costs of equity for (1) the Regional Holding Companies and (2) other groups of comparable firms. The Commission also decided to use, as an additional estimate of the interstate access cost of capital, the average of the overall rates of return prescribed for BOCs by state regulatory commissions.

175. The current authorized rate of return of 12% allows a return on equity of 14.5%, using the current average embedded cost of debt and capital structure. For the most recent seven months for which we have data, January-July 1990, the average "classic" DCF estimates of the RHCs' cost of equity range from 11.7% to 12.6%. These estimates would produce a weighted average cost of capital in the range of 10.4% to 10.9%. The simple average of state overall rate of return prescriptions, adjusted for comparability with interstate practices, was 11.7%.

176. In the face of these numbers, the LECs have urged strenuously that we reject both the DCF estimates for the RHCs and the state cost of capital information, and instead base our represcription on the LEC - sponsored comparable firms analyses or on a CAPM estimate for the RHCs. These LEC analyses produce cost of equity estimates in the range 14.75% -18.25%, which translate to weighted average costs of capital in the range 12.25% - 14.3%. Non-LEC parties have generally supported reliance on our established methodologies, and have advocated rates of return in the range 10.2% - 10.8%.

177. In Part III. B., above, we have considered carefully the record created by the parties on the cost of equity issues. We have determined that our established methodologies have not been impeached, but that some adjustments are warranted for purposes of this represcription proceeding.

178. We have found that the RHCs are still an appropriate surrogate for LEC interstate access service, and that "classic" DCF estimates for the RHCs should be given the greatest weight in our decision. We have rejected contentions that the "cellular effect" has created conditions which render meaningless any use of our single-growth DCF estimates for the RHCs. We have, however, determined that we should give some weight to the possibility that the median IBES growth forecasts used in our formula might produce DCF estimates that are understated by 75-100 basis points; but, we must also consider that an accurate estimate of RHC capital costs may somewhat overstate the cost of capital for interstate access.

179. We have accepted in principle the LEC suggestion that analysis of the costs of equity of the S&P 400 firms can provide a benchmark against which other cost of equity estimates can be evaluated, but we have rejected the contention that the average or median cost of equity of the S&P 400 is a reasonable estimate of the cost of equity for interstate access. We have decided to consider the equity market benchmarks produced in response to the Bureau's *Data Request Order* as a corroborating means of identifying the area within which other cost of equity can be considered reasonable.

180. We have accepted the LEC argument that the simple average of state cost of capital determinations is not entitled to significant weight as an estimate of the current cost of equity, but have rejected the view that information about state decisions should be wholly disregarded. We have found that the more recent state decisions, in particular, are of value as a reasonableness check on other estimates and as an indicator of trends.

181. We have examined each of the LECs' comparable firms analyses and have found that they are entitled to little weight in our decision because those analyses have not identified groups of firms comparable in risk to interstate access service. We have also found that the CAPM analyses in the record can be accorded little weight in this represcription proceeding. We have rejected the contention that increases in certain interest rates since the time of our last represcription proceeding require that we increase the authorized rate of return.

182. Looking at our equity market benchmarks, we see that DCF estimates for the RHCs for the period 1984-1987 were well below the median of the estimates for the entire S&P 400, and were in fact consistently midway between the midpoint estimates for the first (lowest) and second quartiles of the S&P group. Our 1986 prescription, which the Commission said at the time was at the upper end of the then-current zone of reasonableness, was also well below the median of the S&P 400, and was near the midpoint of the second quartile. That was a period during which little other than regulated telephone operations could have been reflected in the RHC estimates. Since we have seen no convincing evidence that the riskiness of regulated monopoly telephone operations has increased radically relative to the riskiness of nonregulated firms subject to full competition,[240] we believe that the cost of equity for interstate access should still be well below the median for the S&P 400, above the midpoint of the lowest quartile of the S&P 400, and at or below the midpoint of the second quartile. In the 7 most recent months for which we have collected data, January-July 1990, the average of the medians of the S&P 400 was 14.9%, the midpoint of the second quartile was 14.1, and the midpoint of the first quartile was 12.4%.

183. If, in the past year or two, the DCF-indicated average RHC cost of equity had risen a great deal relative to the S&P 400 benchmarks, we might have concluded that diversification into riskier nonregulated activities had so transformed the RHCs that they could no longer serve as adequate surrogates for LEC interstate access service. Instead, we see that the average RHC cost of equity has fallen against the S&P 400 group. This observation tends to confirm our earlier conclusion that the application of our simple DCF formula to the RHCs may, at this time, somewhat understate RHC costs of equity. We note that adjusting our DCF calculations for the most recent months upward by 75-100 basis points, as suggested by our analysis of the cellular effect, would again place the RHCs between the the first and second quartile of the S&P 400.

184. The equity market benchmark data also demonstrates that, during most of the period 1984-1987, the estimated average RHC cost of equity was higher than the estimated median cost of equity for large electric companies. This observation confirms that, even before the recent trend towards diversification, telephone holding companies were perceived by investors as somewhat riskier than the average electric utility. We should, therefore, suspect that current estimates of the interstate access cost of equity that fall at or below the median cost of equity for electric utilities are probably too low. For January-July 1990 the average of the median costs of equity for the electric utilities in our group, calculated using our DCF formula, was 11.2%.[241]

185. We have developed these equity market benchmarks in an attempt to refine the suggestions of the parties that either the average cost of equity for the S&P 400 or the average cost of equity for the electric utility industry might serve as an appropriate indicator of the cost of equity for interstate access service. We find that these benchmarks establish the range 12%-14% as a first approximation, or rough estimate, of the area within which a range of reasonable estimates of the interstate access cost of equity will lie. [242]

186. Examination of the most recent state cost of equity determinations supports the reasonableness of that approximation. The ten determinations made in 1989 and 1990 span a range from 11.8%-14%, with eight of the ten in the range 12.6%-13.4%.

187. Turning now to the DCF estimates for the RHCs, we find that the monthly averages for the period January-July, 1990 are 11.71%, 12.27%, 12.03%, 12.11%, 12.29%, 12.32%, and 12.60%. We also find that, in each month

during the period, estimates for individual RHCs have varied over a considerable range, and that in the most recent three months the spreads between the companies with the lowest and the highest estimates have been 209, 141, and 184 basis points. These spreads among the RHCs suggest that a return on equity that would assure all LECs adequate access to capital would lie above the simple average of the RHC estimates, so that an estimate based on unadjusted RHC data alone would lie in the range 12.6%-13.0%. It is this estimate to which we attach the greatest weight in this proceeding.

188. Taking into account our (1) upward adjustment for the possibility that IBES growth estimates may understate investor expectations for cellular earnings, see para. 102, *supra*, and (2) downward adjustment for the possibility that RHC total company costs of equity are higher than the cost of equity for interstate access service alone, see para. 86, *supra*, we find that the cost of equity "zone of reasonableness," that is, the range of reasonable estimates of the interstate access cost of equity, is 12.5%-13.5%.

D. Weighted Average Cost of Capital: Conclusions

189. In section A, above, we found that the average embedded cost of debt for the RHCs is 8.8%, and that the average capital structure of the RHCs is 44.2% debt/55.8% equity. Combining these findings with our finding in section C, above, that the interstate access cost of equity lies in the range 12.5%-13.5%, produces an overall cost of capital "zone of reasonableness" of 10.85%-11.4%.

IV. PRESCRIPTION OF THE ALLOWED RATE OF RETURN

A. Factors to be Considered

190. In the preceding part of this Order we identified the range of reasonable estimates of the cost of capital for interstate access service. We now turn to the task of prescribing an authorized rate of return within that range. The parties suggest two factors that we should consider in reaching our decision: the condition and future of the telecommunications infrastructure; and the state of competition in the interstate access market.

1. Infrastructure

a. Issue

191. The present condition and future development of this country's telecommunications infrastructure has become a focus of concern for regulators, policy makers, and members of industry interested in improving our competitiveness in international markets.[243] The parties raise the issue of what, if any, role our rate of return prescription should play in encouraging infrastructure investment.

b. Positions

192. NYNEX argues that major increases in infrastructure investment are necessary to stimulate the economy and maintain U.S. global competitiveness.[244] NYNEX states that the U.S. is falling behind its competitor nations in the deployment of modern telecommunications technologies; that the U.S. is investing more slowly in its public network infrastructure than many other modern countries; and that there is currently more capital being invested in private networks as opposed to the public network.

193. NYNEX argues, through its expert, William Davidson, that widespread availability of low cost, advanced telecommunications services will stimulate improvements in economic performance,[245] but that lack of infrastructure may doom small business and residential users to "second class services."[246] Davidson also contends that the U.S. must aggressively invest in infrastructure to maintain its position in the international telecommunications services market.[247] He offers Singapore as a prime example of the beneficial results of aggressive infrastructure investment; Singapore's international traffic grew at a compound rate of more than 50% per year in this decade.[248] In support of NYNEX's position that the U.S. is falling behind in the deployment of telecommunications technologies, Davidson states over 80% of the central offices in the French public network utilize digital switches, compared with 40% in the U.S.[249] Davidson also estimates that the U.S. is investing approximately $190 per subscriber line per year, compared to approximately $250 per subscriber line per year for the United Kingdom and Canada.[250] Finally, Davidson contends that there is currently more capital being invested in private networks than in the public network.[251] He contends that the result of such a shift to alternative networks is a reduction in revenues which could severely impact the LECs' ability to fund any network modernization.[252]

194. In response to the Davidson testimony, Ad Hoc offers a report by Economics and Technology, Inc. (ETI), that directly challenges NYNEX's assumptions and conclusions.[253] ETI claims that the U.S. is still superior to its major competitor nations.[254] ETI states that the U.S., relative to its competitor nations, has the highest level of penetration of telephone lines, the second greatest volume of usage per access line,[255] and the most usage per capita.[256] ETI also maintains that the U.S. is neither lagging behind other nations in deployment of modern telecommunications technologies, nor in investment in its public network. ETI submits that the U.S. leads France in the percentage of lines served by computer-controlled switches, and that the digital switch argument presented by Davidson is therefore misleading.[257] ETI estimates that the U.S. spent in excess of $300 per access line in 1988.[258] In ETI's view, if competitor nations were outspending the U.S. on telecommunications infrastructure, it would be because they were trying to catch up to us.[259] Finally, the ETI study maintains that the "private network" threat perceived by NYNEX is no threat because most private networks are constructed of public network elements.[260]

195. In rebuttal, NYNEX alleges that the study presented by Ad Hoc contains several flaws. According to NYNEX's Davidson, the ETI study relied on stale data and was not forward-looking.[261] NYNEX also contends that the U.S. is no longer the leader in penetration levels,[262] that much of the current investment by foreign nations is not "catch up",[263] and that the U.S. is behind in deployment of modern technologies.[264] Moreover, NYNEX maintains that Ad Hoc mischaracterizes the extent of foreign investment in equipment investment, and fails to account for the differences in the accounting treatment of certain costs which would increase foreign investment.[265]

196. The Consumer Interest Research Institute (CIRI) and the World Institute on Disability, Inc. (WID) also contend that modernization of the telephone infrastructure is necessary. CIRI/WID argues that the survival of our prosperous nation depends on an informed citizenry.[266] An informed citizenry is possible only through a policy encouraging access to information by all. CIRI/WID argues that access to information must be brought to the general public through the public telephone network because of the level of penetration of the telephone.[267] Therefore, modernization of the public network infrastructure is necessary. To conclude otherwise, CIRI/WID states, would bar access to the "information age" by certain sectors of the population, particularly the elderly and disabled.[268]

197. All the LECs contend that in the future infrastructure investment will be riskier than in the past. They attribute the increased risk in part to the necessity of justifying infrastructure investments based on future revenues that are uncertain because of the vagaries of customer demand and competition.[269] NYNEX also states that the new services made available by infrastructure investment will succeed, in many situations, only if such services are widely available, which requires large-scale, rather than incremental, investments.[270] Several LECs link the alleged riskiness of infrastructure investment to the authorized rate of return as follows: companies invest in a project as long as the return on the investment in the project equals or exceeds the cost of capital for the project. Traditional rate of return regulation, by limiting return on all activities to the company's overall cost of capital, discourages investment in anything that is above-average in risk and capital cost. Infrastructure development requires investment in new technology that is more risky than average. Therefore, the opportunity to earn above the cost of capital is the starting point for infrastructure development.[271] Other LECs contend that, because the higher risk of infrastructure investment is incorporated in the investors' perception of the company's business risk, investors will not purchase telephone stocks and bonds unless the LEC rate of return is increased to cover the infrastructure risk.[272] NYNEX notes, however, that the increased risk can be accommodated through a rate of return set at the upper end of the zone of reasonableness; the infrastructure risk does not require a rate of return outside this zone.[273]

198. Consumer Coalition states that the LECs offer no explanation why infrastructure investment would ever be risky under rate of return.[274] Consumer Coalition contends that there is no evidence that future network investment will be so different in type or amount from investment already made that its recovery through normal cost accounting will not occur.[275] Ad Hoc states that the BOCs belie their contention that investors perceive infrastructure investment as risky by emphasizing such investment in RHC annual reports.[276] Therefore, non-LEC parties argue, infrastructure investment does not require an upward adjustment in the rate of return.

199. Non-LEC parties offer two additional arguments against an upward adjustment in the rate of return based on infrastructure investment. First, Ad Hoc contends that discretionary investment, like infrastructure upgrading, is not driven by the rate of return.[277] Ad Hoc argues that this is demonstrated by the fact that the RHCs have different levels of infrastructure investment, but have the same rate of return. Moreover, Ad Hoc claims, an upward adjustment of the rate of return does not guarantee increased infrastructure investment. Consumer Coalition argues that an increase in rate of return to encourage infrastructure investment may drive demand for services down, forcing earnings to decrease, thereby resulting in lower infrastructure investment.[278] Consequently, no upward adjustment should be made for infrastructure investment.

c. Discussion

200. The Communications Act establishes as a core purpose of this agency "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[279] Thus we must take care that our policies and rules be both designed and implemented so as to foster responsible, cost-effective development and modernization of the telecommunications infrastructure.

201. The authorized rate of return plays an essential, but limited role in infrastructure development. A rate of return set below the cost of capital would limit carriers' access to capital markets and thereby discourage new investment in telecommunications plant. It does not follow, however that an authorized rate of return above the cost of capital would promote economically efficient infrastructure investment. Indeed, allowing carriers to target rates for monopoly service so as to earn returns above their cost of capital might send distorted signals, thereby promoting uneconomic allocation of resources. Such a high rate of return might provide carriers with additional profits to invest or to distribute to shareholders,[280] but it would not guarantee that those profits were invested in the domestic public telecommunications network.

202. Under traditional rate of return regulation, a regulatory agency that wanted to assure that earnings authorized for infrastructure purposes were in fact invested in the infrastructure would have to (1) establish specific investment objectives for each carrier under its jurisdiction and (2) obtain an enforceable commitment from each carrier that the goals will be met. The record of this represcription proceeding would not suffice as a basis for such a regulatory program. Furthermore, since virtually all telecommunications plant is jointly used in intrastate and interstate operations, it is not clear that we could impose investment requirements without coming into conflict with the programs already underway in a number of states.

203. Information submitted by carriers in this docket does, however, raise questions about whether modernization of the network is taking place as quickly as we would like. There is no evidence that lack of access to capital is currently a problem; indeed, internally generated funds have exceeded telephone plant construction for the past several years. Nonetheless, our concern about the possibility of a lag in the deployment of advanced technologies counsels that we should exercise our judgment to select a rate of return in the upper part of the range of reasonable cost of capital estimates.

2. Competition/Bypass

a. Issue

204. In the *1986 Represcription Proceeding* the Commission found that overall company risks due to competition were reflected in the results of market-based cost of capital methodologies such as DCF. It also found that these risks were less for intrastate operations than for interstate operations, and that that disparity was not fully offset by the presence of riskier nonregulated activities. The Commission therefore concluded that an upward adjustment to the DCF estimates of RHC costs of capital was needed to reflect the risks posed by competition in the interstate access market.[281] In the instant proceeding the parties debate the existence and scope of competition and the manner in which risks due to competition should be reflected in our decision.

b. Positions

205. The LECs argue they face increasing competition from a growing number of alternative access providers,[282] as well as from interexchange carriers. They point to recent tariff offerings by interexchange carriers which purportedly encourage large users to leave the public network and use alternative access services as proof that LECs face significant competition.[283] NYNEX states that its telephone operating companies in 1989 lost over $400 million in revenues to bypass.[284] Moreover, NYNEX states that, according to its own reports filed in CC Docket 87-339,[285] bypass is growing by 40% each year.[286]

206. In support of its position that LECs face increased competition, Bell Atlantic's expert, Professor Jerry Hausman finds that alternative access providers (AAPs) currently compete in 17 metropolitan areas, and are expected to grow to 28 within two years;[287] that multiple AAPs exist in metropolitan areas;[288] and that AAPs are able to provide networks in multiple cities while a LECs typically offers such a service only within its regional holding company area.[289] Hausman states that high sunk costs combined with low average variable and incremental costs for adding new customers to networks creates incentives for the AAPs to remain in business and offer competitive prices. Hausman also finds that the LECs face increased competition from the interexchange carriers because these carriers are offering incentives to large business customers which seek to shift customers from switched access, provided by the LECs, to special access, provided by LECs, the interexchange carrier, or an AAP.[290] These examples, Hausman concludes, demonstrate that the LECs face real and increasing competitive risks.[291]

207. The LECs contend that investors are aware of this competition and bypass and consider LECs riskier investments, thereby increasing LEC cost of capital. They cite in this regard recent changes in the credit rating criteria applied to telephone companies by bond rating agencies.[292] The LECs suggest that this increased risk is only partially reflected in quantitative cost of capital analyses.[293] Therefore, this Commission should select an authorized rate of return in the upper portion of the "zone of reasonableness."[294]

208. Non-LEC parties contend that the LECs retain a monopoly share of the exchange access market and do not face competition except in the geographically-limited high capacity "niche" markets.[295] Ad Hoc states that this Commission has recently found, not only that competition is insignificant in the high capacity access market,[296] but that the LECs were pricing such services so far above cost that the Commission was forced to act to control such practices.[297] Ad Hoc also maintains that the most direct measure of business risk is a regulated company's ability to achieve or exceed its prescribed earnings level. Using this measure, Ad Hoc concludes that the BOCs face no significant business risks because the majority earned at or above the authorized rate of return in 1988 and 1989.[298] Finally, Consumer Coalition rejects the LECs' bond rating argument, stating that bond rating agencies are concerned with increased business risk only to the extent it is not accommodated by reduced financial risk, and that such agencies are more concerned with increased risk from diversification than with risks from competition in the interstate access market.[299]

209. Non-LEC parties also argue that the LECs face no serious threat of bypass.[300] Ad Hoc states that the private networks of today do not pose a bypass threat since these networks are constructed of public network elements.[301] In answer to NYNEX's claim of over a $400 million loss in revenues to bypass, Consumer Coalition states that "[a]lthough documenting bypass in areas such as Manhattan and Boston should be easier than in other RHC territories, NYNEX has documented only $23 million of its estimated losses due to bypass."[302] Finally, non-LEC parties maintain that the DCF formula, since it is a market-based cost of equity formula, takes into account investor perceptions of competition and bypass,[303] and therefore, there is no need for an upward adjustment in setting the authorized rate of return.

c. Discussion

210. It is apparent that the source and nature of the competitive risks facing LECs have changed somewhat since our last represcription proceeding. On the one hand, the very real risks of uneconomic service bypass that once existed have now largely dissipated, due primarily to the implementation of the Subscriber Line Charge program.[304] On the other hand, new facilities-based competition has emerged in the high capacity special access market. The appearance of this kind of competition may be new and somewhat disconcerting to members of an industry in which no competition at all existed a few years ago, but it hardly changes the fact that, in most areas and for most services, the LECs remain regulated monopoly providers of an essential public utility service. As such, they face far less business risk from competition than most nonregulated companies. For our purposes in this proceeding, however, the most important consideration is that both the levels of bypass claimed by the carriers[305] and the existence of alternatives access providers such as Metropolitan Fiber Systems and Teleport [306] are matters of public record and are well known to the investment community. Our market-based cost of capital estimates capture investor perceptions of RHC business risks, including future risks from interstate access competition and bypass; no additional or separate consideration of competition and bypass is necessary.

211. Furthermore, we can no longer assume, as we did in 1986, that the competitive risks attendant upon any RHC's interstate access operations exceed the risks of that RHC as a whole company. As the LECs have stressed in the record herein, RHC diversification into nonregulated arenas has increased in the past four years. We believe that the higher risks of nonregulated activities outweigh any component of especially low risk that might be attributed to intrastate regulated operations. We have taken this

possibility into account in reaching our findings as to cost of equity; no further consideration or adjustment to the end result is required.

212. On balance, we find that the debate in the record over the existence and significance of competition and bypass offers little guidance on the question of where within the range of reasonable cost of capital estimates we should prescribe the unitary rate of return.

B. Decision

213. It is well established that rate of return prescription under the "just and reasonable" standard requires a balancing of ratepayer and shareholder interests.[307] The regulated company must be allowed the opportunity to earn a return that is high enough to maintain the financial integrity of the company and to attract new capital to the business.[308] At the same time, the authorized rate of return must not produce rates that are excessive.[309] The courts have also recognized that there is a zone of reasonableness within which reasonable rates may fall, and that we are entitled to exercise our judgment in selecting a rate of return within that zone.[310]

214. In Part III of this order we examined the cost of capital evidence in the record and concluded that the overall cost of capital for LEC interstate access lies in the range 10.85%-11.4%. We have now considered the arguments of the parties concerning other factors which they claim should influence our decision. We have determined that our concern for the future development of the infrastructure strongly suggests that we prescribe a rate of return toward the upper portion of the range we have identified.

215. In addition to the specific factors raised by the parties, we must also keep in mind that we are making this prescription for a future that is, as always, uncertain. The prescription will be in effect for two years or more, during which time costs of capital will fluctuate. While we cannot purport to forecast capital costs or any other aspect of the future with certitude, we do believe that, at this time, prudence favors a rate of return in the upper part of the range of reasonable cost of capital estimates.

216. Taking all of these matters into account, we conclude that an overall rate of return of 11.25% will strike a viable and sustainable balance between ratepayer and shareholder interests.[311]

217. In light of the ruling in the *Automatic Refund Decision*, in which the Court of Appeals determined that our automatic refund provision was at odds with our own understanding of our rate of return prescription,[312] we wish to clarify that we do not view this prescription as "both a maximum and a minimum." That is, it does not represent a unique balance point such that "[i]f the rate were higher, the balance would tip in favor of the investor; if lower, it would tip in favor of the consumer."[313] Our accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. Indeed, even the lower boundary of our range of cost of capital estimates does not represent a bright line such that a company earning just below that level would be forced out of business. We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

218. It is also important to note, in light of our concurrent decision in the price caps docket concerning earnings limitations for price caps carriers, that neither our finding that the cost of capital is in the range of 10.85-11.4, nor our decision to prescribe a unitary rate of return of 11.25%, constitutes, in our view, an absolute finding that, under all circumstances, rates producing earnings above these levels are exorbitant, while rates below these levels are confiscatory.[314] As discussed in the price caps order, a rate of return that would clearly be excessive for a carrier that is allowed to recover all of its costs under rate of return regulation may be entirely reasonable for a carrier that has had to reduce rates, reduce costs, and become more efficient in order to take advantage of the incentives offered by our price cap plan. Similarly, we believe it is reasonable to balance the possible rewards of price cap regulation, and to reenforce the positive incentives those rewards provide, by requiring the carrier to accept the risk that it might experience earnings somewhat below the prescribed rate of return.

219. Finally, we observe that, while Part 65 clearly contemplates initiation of a represcription proceeding every two years,[315] the rules do not state that our rate of return prescriptions must expire at the end of two years. This prescription will take effect on January 1, 1991. It will endure until it is replaced with a new prescription.

220. In the interval between now and January, 1992, when the ne . represcription proceeding is scheduled to begin, we shall be returning to the task of refining our rate of return procedures. It may well be that our decision to regulate the largest carriers under a price caps regime will allow us to further streamline what is still a cumbersome and expensive process for determining the cost of capital. It may also be that we would wish to explore at the same time forms of incentive regulation suitable to replace traditional rate of return regulation for even the smallest LECs under our jurisdiction. An open ended prescription allows us a measure of flexibility to pursue these options.

221. We emphasize that we are by no means precluding represcription on the schedule contemplated by Part 65, or sooner if economic conditions so required. Nor are we at this time announcing a postponement of the January, 1992 initial submissions. We are simply establishing as a part of this rate of return prescription that the prescription is not intended to expire on December 31, 1992.

V. DISPOSITION OF PROCEDURAL MOTIONS

222. Four parties filed motions to accept late filed notices of appearance in this proceeding.[316] On March 14, 1990, the Chief, Common Carrier Bureau adopted an Order[317] extending the time period for filing a notice of appearance until April 17, 1990.[318] All of the requesting parties filed notices of appearance within the extended time period, and we therefore dismiss their motions to accept late filed notices of appearance as moot.

223. Texas OPUC's April 9th Notice of Appearance also requested acceptance of its late filed affidavit and brief. Texas OPUC explained that its late filing resulted from late knowledge of the proceeding, as well as an unsuccessful attempt to submit its affidavit and brief with a party who timely filed.[319] On April 14, 1990, Southwestern filed an Opposition and Motion to Strike in reference to Texas OPUC's Notice of Appearance requesting acceptance of its affidavit and brief. Southwestern argued that, not only

had Texas OPUC failed to justify its late filed pleading, but Texas OPUC also filed a procedurally defective pleading.[320] Southwestern claimed that these defects justify rejection of Texas OPUC's filing "as they prejudice the other parties of record."[321] In the alternative, Southwestern requests that we accept its supplemental rebuttal submission in response to Texas OPUC's filing.[322]

224. Although we do not routinely accept late filed pleadings, we find that acceptance in this instance furthers the purpose of building a complete record in this proceeding. Only one party, Southwestern, objected to Texas OPUC's filing. Southwestern's main objection is that the filing is procedurally defective and such defects prejudice parties to the proceeding. The only alleged "defect" of potential prejudice is Texas OPUC's lack of certificate of service and apparent lack of service to Southwestern. We find, however, that this alleged "defect" was not prejudicial to Southwestern. Not only did Southwestern receive a copy of Texas OPUC's filing six days prior to its next filing date, but Southwestern also filed a lengthy supplemental rebuttal submission, which we accept as part of the record in this proceeding, directed at OPUC's filing. Moreover, Southwestern also had the opportunity to address Texas OPUC's filing in its proposed findings of fact and conclusions which were not to be filed until July 2, 1990.

225. On May 22, 1990, Ameritech filed a Motion to Accept Late Filed Pleading in reference to its supplemental submission concerning price cap issues.[323] On July 3, 1990 Consumer Coalition filed a Motion for Leave to File Out of Time in reference to its Proposed Findings due on July 2, 1990. Both parties cited mechanical difficulties in producing their submissions as reason for the late filings. Ameritech stated that no party would be prejudiced by its one day late filing since it served all parties by mail on May 21, 1990, the filing date.[324] Consumer Coalition stated that it would be in the public interest to accept its motion because of "the Coalition's unique status as a broad-based interstate access consumer group actively pursuing all of the legal and economic issues in this proceeding."[325] Consumer Coalition also maintained that it would make hand service upon all parties to this proceeding that designated an agent for service in Washington, D.C. by early afternoon on July 3.

226. We find that both Ameritech and Consumer Coalition have shown good cause for their late filings. Since no party objects to the late filings, and since accepting these late filings will serve to provide us with a complete record upon which we can make an informed decision, we shall accept Ameritech's May 22 filing and Consumer Coalition's July 3 filing.[326]

227. On January 22, 1990, USTA filed a Petition for Waiver of the "appropriate provisions of Part 65 of the Commission's rules to permit USTA, although it is not a carrier subject to Part 65, sufficient status to place on the record on February 16, 1990 calculations of the cost of capital."[327] USTA also sought waiver of section 65.102(b)(1) "so its filing will not count within the pages set therein for any carrier."[328]

228. Although Part 65 anticipated that only carriers would file the initial rate of return submissions,[329] such a limited reading is contrary to the purpose of our numerous rounds of submissions; to have a "full and fair record".[330] We find that the use of the words "initial carrier rate of return submissions", used in Part 65, are not words of limitation, rather they are words indicating who must file submissions in the initial round of the comment cycle.[331] Consequently, a waiver is not required for USTA's participation in the initial submission round, and we dismiss as moot their waiver request.

229. On June 29, 1990, BellSouth filed a Petition for Waiver of Section 65.105(c) of the Commission's rules for the final round of comments due on July 16, 1990.[332] BellSouth reasoned that waiver of hand service was necessary because the July 4th holiday would delay receipt of proposed findings of fact and conclusions, due on July 2, 1990, by parties not located in Washington, D.C., and these parties would need the entire weekend preceding the July 16th filing date to prepare the reply proposed findings of fact and conclusion to meet the filing date. BellSouth also claimed that, because the purpose of the hand service rule is to provide parties the full time granted under the Commission's rules to prepare a response, no party would be prejudiced by approval of this waiver since no additional responsive pleadings would be forthcoming.[333]

230. Since the filing date and thus, the hand service date have passed, we dismiss as moot BellSouth's waiver request. We note, however, that we find BellSouth's reasoning unconvincing because the hand service rule would have been necessary to prevent prejudice to any party seeking oral argument on the reply proposed findings of fact and conclusions.[334] Moreover, BellSouth did not provide persuasive evidence of its inability to make service by hand to parties on the filing date.

VI. ORDERING CLAUSES

231. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 154(j), and 201-205, that the authorized rate of return for the interstate access services of the local exchange carriers IS PRESCRIBED to be at an annual rate of 11.25 percent.

232. IT IS FURTHER ORDERED, that the motions to accept late filed notices of appearances filed by Colorado Office of Consumer Counsel, General Service Administration, Indiana Office of Utility Consumer Counselor and Ohio Office of Consumers' Counsel ARE DISMISSED.

233. IT IS FURTHERED ORDERED, that the Notice of Appearance requesting acceptance of its notice of appearance, and its late filed affidavit and brief filed by Texas Office of Public Utility Counsel IS GRANTED IN PART to the extent indicated herein.

234. ITS IS FURTHERED ORDERED, that the Motion to Strike Texas Office of Public Utility Counsel's late filed notice of appearance, affidavit, and brief filed by Southwestern Bell Telephone Company IS DENIED and DISMISSED to extent indicated herein.

235. IT IS FURTHER ORDERED, that the Motion to Accept Late Filed Pleading filed by Ameritech Information Technologies Corporation and the Ameritech Operating Companies IS GRANTED.

236. IT IS FURTHER ORDERED, that the Motion for Leave to File Out of Time filed by Consumer Coalition IS GRANTED.

237. IT IS FURTHER ORDERED, that the Motion for Leave to File a Supplemental Affidavit submitted by Consumer Coalition IS GRANTED.

238. IT IS FURTHER ORDERED, that the Petition for Waiver of the appropriate Part 65 rules to allow United States Telephone Association to file an initial rate of return submission filed by United States Telephone Association IS DISMISSED.

239. IT IS FURTHER ORDERED, that the Petition for Waiver of Section 65.105(c) filed by BellSouth IS DENIED.

240. IT IS FURTHER ORDERED, that the Motion to Substitute Original Affidavit for Facsimile Copy filed by Ameritech Information Technologies Corporation and the Ameritech Operating Companies IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In addition, on May 7, 1990, 21 parties filed Supplemental Submissions addressing the prescription of earnings limitations for price caps carriers; Replies to Supplemental Submissions were filed on May 21, 1990, by sixteen parties. These pleadings are addressed in the price caps order. *See* Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, CC Docket 87-313, FCC No. 90-314, 5 FCC Rcd _____ (released Oct. 4, 1990).

[2] Lists of the parties filing each type of pleading are contained in Appendix A. Hereinafter, parties will be referred to by the short names indicated for each in the appendix.

[3] A list of ex parte presentations in this docket appears at Appendix B.

[4] *See* Refinement of Procedures and Methodologies of Represcribing Interstate Access Rates of Return for AT&T Communications and Local Exchange Carriers; Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 197, 202 (1989).

[5] United States v. AT&T, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 US 1001 (1983).

[6] AT&T; Modification of Prescribed Rate of Return, 86 FCC 2d 221 (1981), *aff'd sub nom.* United States v. FCC, 709 F.2d 610 (D.C. Cir. 1983); AT&T (Docket 20376), 57 FCC 2d 960 (1976); AT&T (Docket 19129), 38 FCC 2d 213 (1972), *aff'd sub nom.* Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975); AT&T (Dockets 16258 and 15011), 9 FCC 2d 30 (1967).

[7] *See* MTS and WATS Market Stucture, Phase I, *Third Report and Order*, 93 FCC 2d 241 (1983).

[8] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, *Notice of Proposed Rule Making*, CC Docket. No. 84-800, FCC 84-395, 49 Fed. Reg. 32971 (August 17, 1984); *Supplemental Notice of Proposed Rule Making*, FCC 85-458, 50 Fed. Reg. 33786 (August 21, 1985).

[9] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527, 50 Fed. Reg. 41350 (October 10, 1985), *mod. on recon.*, FCC 86-114, 51 Fed. Reg. 1103 (April 1, 1986), *further recon. den.*, 2 FCC Rcd 190 (1987), *remanded sub nom.*, AT&T v. FCC, 836 F.2d 1386 (D.C. Cir. 1988) (*Automatic Refund Decision*); Phase II, FCC 85-645, 51 Fed. Reg. 1796 (January 15, 1986), *mod. on recon.*, 104 FCC 2d 1404 (1986) (*84 -800 Phase II Recon. Order*); Phase III, FCC 86-354, 51 Fed. Reg. 32920 (September 17, 1986), *recon. den.*, 2 FCC Rcd 5636 (1987) (*1986 Represcription Proceeding*).

[10] 47 C.F.R. §65.1 *et. seq.*

[11] 47 C.F.R. §65.102(c).

[12] 47 C.F.R. §65.100. Parties to the proceeding are given at least two, and in some cases, three opportunities to submit comments. *See also* 47 C.F.R. §65.105.

[13] 47 C.F.R. §65.103.

[14] 47 C.F.R. §65.104.

[15] 47 C.F.R. §65.106.

[16] 47 C.F.R. §§65.200 - 65.450.

[17] *See* 47 C.F.R. §65.201.

[18] *See* 47 C.F.R. §§ 65.300 - 65.304.

[19] *See* 47 C.F.R. §§65.400, 65.300 - 65.304. Under this "comparable firms" approach, specified screens were to be used to determine a list of firms that exhibit risk and financial characterstics comparable to the LECs' interstate access service.

[20] 47 C.F.R. §65.303. The DCF methodology requires identification of a stock price, a dividend, and a growth factor. In reaching these figures, the Commission rules require the use of data compiled over a two-year period. *See* 47 C.F.R. §65.303 (b)(c) and (d).

[21] *84 -800 Phase II Recon. Order*, 104 FCC 2d at 1407, 1423-27. Although the Commission explicitly adopted the classic DCF methodology as one cost of equity estimate, codification was deferred. *Id.* at 1407.

[22] For the LECs, the increment was 25 basis points (one quarter of one percent) on overall interstate earnings, and 40 basis points (four tenths of one percent) on each of three categories of interstate access services. *See* 47 C.F.R. §§ 65.700(b) and 65.700(a), respectively.

[23] 47 C.F.R. §65.701(a).

[24] The refund was to be in the form of subsequent period reductions in the carrier's revenue requirement for the category in which the carrier overearned. 47 C.F.R. §65.703.

[25] *Automatic Refund Decision*, *supra*.

[26] *Id.*, 836 F.2d at 1390.

[27] *Id.*

[28] New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101 (D.C. Cir. 1987).

[29] *Represcription Proceeding* at paras. 45-46.

[30] Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, *Notice of Proposed Rule Making*, 2 FCC Rcd 6491 (1987) (*87-463 Notice*).

[31] *Id.* at 6491.

[32] *Id.* at 6491.

[33] *Id.* at 6493-94.

[34] *See* 47 C.F.R. §65.102(c).

[35] Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, *Memorandum Order and Opinion*, 3 FCC Rcd 1697 (1988) (*Deferral Order*).

[36] Deferral of Rate of Return Represcription Filings Pursuant to Section 65.102(c) of the Rules, *Memorandum Opinion and Order*, 3 FCC Rcd 7220 (1988) and *Memorandum Opinion and Order*, 4 FCC Rcd 3920 (1989). The second delay pushed the filing date beyond June 30, 1989.

[37] Comment Sought on Extension or Revision of the Current Rate of Return Prescription for Interstate Services of Local Exchange Carriers, *Public Notice*, 4 FCC Rcd 7051 (1989).

[38] Refinement of Procedures and Methodologies of Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers; Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, *Order*, 5 FCC Rcd 197 (1989) *Interim Prescription*).

[39] *Id.* at 202.

[40] *Id.*

[41] *Id.* at 20.

[42] *Id.* at 202.

[43] Policy and Rules Concerning Rates for Dominant Carrier, *Notice of Proposed Rulemaking*, 2 FCC Rcd 5208 (1987); *Further Notice of Proposed Rulemaking*, 3 FCC Rcd 3195 (1988) (*Further Notice*); *Report and Order and Second Further Notice of Proposed Rulemaking*, 4 FCC Rcd 2873 (1989) (*Second Further Notice*).

[44] Policy and Rules Concerning Rates for Dominant Carriers, *Supplemental Notice of Proposed Rulemaking*, 5 FCC Rcd 2176 (1990). We received comments on these issues in both this proceeding and the price caps proceeding. We address them in the price caps order which we adopt today, having incorporated in that docket the comments filed in this proceeding.

[45] *See* § 65.300.

[46] *e.g.*, USTA Proposed Findings at Appendix 1, p.2; Ameritech Proposed Findings at 19-21; Bell Atlantic Proposed Findings at 19-20; Southwestern Proposed Findings at 9-10.

[47] Maryland PC response at 2-3.

[48] Bell Atlantic Initial Submission at Vander Weide Affidavit, Appendix A, p.3.

[49] *See generally* J. Bonbright, A. Danielsen, D. Kamerschen, *Principles of Public Utility Rates* (2d ed. 1988), pp. 308-311.

[50] Bell Atlantic Initial submission at Attachment.

[51] USTA Proposed Findings at Appendix 1, p.2.

[52] Long-term debt on behalf of the ESOPs totaled $790 million in 1989. Bell Atlantic Annual Report to Shareholders at 39-40.

[53] US West Initial Submission at Appendix A, Attachment 5, p.1 (revised).

[54] USTA Proposed Findings at Appendix 1, p.2.

[55] US West's 10K Report at A-6.

[56] *See* 47 C.F.R. §65.303.

[57] The data supporting these calculations is set out in Appendix D.

[58] 47 C.F.R. §65.400.

[59] *Interim Prescription Order*, 5 FCC Rcd 197, 202.

[60] 47 C.F.R. §65.201(a).

[61] *Interim Prescription Order*, 5 FCC Rcd. 197, 202.

[62] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 543 (1990) (*Data Request*). *See also* Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 892 (1990) (modifying and clarifying the data request).

[63] 47 C.F.R. §65.303.

[64] Ameritech Proposed Findings at 24; Bell Atlantic Proposed Findings at 19; Pactel Proposed Findings at 13.

[65] US West Proposed Findings at 11; USTA Proposed Findings at 20; Southwestern Proposed Findings at 17; Rochester Proposed Findings at 13.

[66] *See e. g.*, Southwestern Initial Submission at 3, *citing* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Companies, CC Docket 84-800, Phase III, FCC 86-354, 51 Fed. Reg. 32920 (September 17, 1986), (*1986 Represcription Proceeding*), *recon. denied*, 2 FCC Rcd 5636 (1987).

[67] *See e.g.*, Pactel Reply Findings at 3.

[68] *See e.g.*, Southwestern Initial Submission at 3, *citing* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Companies, CC Docket 84-800, Phase III, FCC 86-354, 51 Fed. 32920 (September 17, 1986), (*1986 Represcription Proceeding*), *recon. denied*, 2 FCC Rcd 5636 (1987).

[69] *e.g.*, NYNEX Proposed Findings at 10-11; SNET Proposed Findings at 3; Pactel Proposed Findings at 24-25; US West Proposed Findings at 24-25.

[70] Response of Tennessee PSC at 9-10. We note that, during the pendency of this proceeding, the Tennessee PSC reduced its overall rate of return for South Central Bell from 12.18% to 11.6%. Telecommunications Reports, August 13, 1990, at 18.

[71] Consumer Coalition Response at 15.

[72] Phase II Order at paras. 25-33; Phase III Order at paras. 24-28.

[73] *See* Appendix D.

[74] USTA Proposed Findings at 18-19; Pactel Proposed Findings at 25-27; Southwestern Proposed Findings at 18-19.

[75] USTA Proposed Findings at 19; Pactel Proposed Findings at 26; Southwestern Bell Proposed Findings at 19.

[76] 5 FCC Rcd 197 at 200.

[77] *Id* at 202.

[78] Another purpose was to collect the data needed to implement the Commission's 1986 decision to use a "classic" DCF formula to estimate RHC costs of capital in future represcription.

[79] We note in this regard that USTA does not apply market weighting in calculating the cost of equity for its comparable firms group.

[80] *1986 Represcription Order*, para. 39.

[81] Consumer Coalition Initial Submission, Miller Statement Table 1.

[82] Bell Atlantic Initial Submission, Affidavit of Vander Weide, Appendix A at 5.

[83] *1986 Represcription Order*, para. 15.

[84] Consumer Coalition Proposed Findings at 6.

[85] *See, e.g.*, BellSouth Initial Submission, Carleton Statement at 28 (Method specified in data submission produces a downward bias).

[86] USTA Reply Findings at 21.

[87] *See, e.g.*, BellSouth Initial Submission, Testimony of Carleton at 35-41; USTA Initial Submission, Appendix 1.

[88] *See* III. C. 10.b., below.

[89] *Phase II Reconsideration Order*, paras. 57-58.

[90] *Id.*

[91] *1986 Prescription Order*, para. 51.

[92] *e.g.*, PacTel Initial Submission at 16. BellSouth witness Carleton, while asserting the "conceptual superiority" of the quarterly-compounding model (BellSouth Rebuttal, Carleton Statement at 21), based his recommendations on the annual model because the results of using that model were not significantly different from the compounding model and the annual model is simpler to understand. BellSouth Initial Submission, Carleton Statement at 18.

[93] *e.g.*, USTA Rebuttal at 21.

[94] Consumer Coalition Findings at 5, n.11.

[95] TPSC Response, Klein Statement at 20-22.

[96] Pa OCA Reply Findings at 10, citing Kahal Statement at App. B.

[97] Consumer Coalition Proposed Findings at 5, n.11. Bell Atlantic, however, contends that the retention of earnings does not guarantee a return to shareholders at the authorized return level. Bell Atlantic Rebuttal, Vander Weide Statement at 33. *See also* BellSouth Rebuttal, Carleton Statement at 21.

[98] *Phase II Order*, para. 43.

[99] *Phase II Reconsideration Order*, paras. 60-62.

[100] *See, e.g.*, Bell Atlantic Rebuttal, Vander Weide Statement at 33-34 (stock issuance costs are not recovered in the period when incurred; benefits of capital raised will accrue over a long time period); Ameritech Rebuttal, Linke Statement at Ex. 3 (if flotation adjustment was allowed during the year that capital was raised, adjustment must continue because rate base was increased only by the net proceeds from equity issue).

[101] *e.g.*, PacTel Initial Submission at 19.

[102] Pa. OCA Proposed Findings at 11, citing Kahal Statement at 14.

[103] Consumer Coalition Proposed Findings at 8, n.19.

[104] *Phase II Reconsideration Order*, para. 62.

[105] This is true whether DCF, CAPM, or a comparable earnings approach is used.

[106] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carrier, CC Docket 84-800, Phase II, FCC 85-645, 51 Fed. Reg. 1796, Para. 36 (January 15, 1986), *mod. on recon.*, 104 FCC 2d 1404 (1986).

[107] *Id.*

[108] *See e.g.* Bell Atlantic Proposed Finding at 14 (implying that application of the DCF formula to RHC data creates a downward bias by stating that LEC cost of equity is "appreciably greater" than RHC cost of equity due to the "portfolio effect"); Ameritech Proposed Finding at 29 (stating that "Drs. Vander Weide and Carleton showed that the different anticipated growth rates create a downward bais in the DCF-indicated return for the RBOCs.").

[109] *See e.g.*, Rochester Proposed Findings at 8, US West Proposed Findings at 16, Pactel Reply Proposed Findings at 3-4.

[110] Bell Atlantic Proposed Findings at 13, *citing*, *87-463 Notice*, 2 FCC Rcd at 6493.

[111] Bell Atlantic Proposed Findings at 14; Bell Atlantic Reply Proposed Findings at 10-12. *See also* USTA Reply Proposed Findings at 14. The "portfolio effect" is the reduction in the variability of an investor's overall portfolio return through the inclusion of assets whose returns are less than perfectly correlated. Bell Atlantic Rebuttal at Attachment 1, p. 8.

[112] Bell Atlantic Initial Submission at Attachment 1, pp. 4-5. The companies included in Vander Weide's correlation study included 3 telephone companies, 3 leasing companies, 3 cellular companies, and 2 service maintenance companies.

[113] *Id.*

[114] *Id.* at 5.

[115] This argument is set out in greater detail in section III.B.8; below.

[116] *See e.g.*, US West Proposed Findings at 19.

[117] *See e.g.*, Consumer Coalition Proposed Findings at 4-5; Pennsylvania OCA Reply Proposed Findings at 11.

[118] Consumer Coalition Proposed Findings at 9; GSA Proposed Findings at 12.

[119] Consumer Coalition Proposed Findings at 15. Consumer Coalition notes that all the LECs endorse the DCF formula, except Ameritech.

[120] Maryland PC Response at 4.

[121] Consumer Coalition Reply at Statement of Ralph E. Miller, p. 14.

[122] *Id.*

[123] *Id.* at 11-13.

[124] *Id.*

[125] Consumer Coalition Proposed Findings at 12, *citing* NYNEX Rebuttal at Attachment B, p. 11.

[126] Bell Atlantic Rebuttal at Attachment 1, p. 9.

[127] Bell Atlantic Reply Proposed Findings at 11, n.31.

[128] *See e.g.*, Consumer Coalition Proposed Findings at 30. Consumer Coalititon contends that the Commission has stated that "regulated ratepayers should benefit from joint cost savings resulting from combined operations." *Id.*, *citing*, Separation of costs of regulated telephone service from costs of nonregulated activities, 2 FCC Rcd 1298, 1304 (1987).

[129] *See e.g.*, Bell Atlantic Proposed Findings at 14, n.38; Rochester Reply Proposed Findings at 3-5.

[130] *See* 2 FCC Rcd at 6493.

[131] Standard & Poor's, *Telecommunications Ratings Update*, May 13, 1988, pp. 10-11.

[132] *See* Part III. C., below.

[133] Ameritech Initial Submission at 10, Testimony of Linke at 16-17; Bell Atlantic Initial Submission at 5, Affidavit of Vander Weide at 2; BellSouth Initial Submission, Testimony of Carleton at 24; NYNEX Initial Submission at 6, Testimony of Carleton at 18, Statement of Cogswell at 2, Statement of Morris at 2; Pactel Initial Submission at 9; Southwestern Bell Initial Submission at 17; US West Initial Submission at 19.

[134] *E.g.*, Bell Atlantic Initial Submission, Affidavit of Vander Weide at 3; Ameritech Initial Submission, Testimony of Linke at 17-18.

[135] NYNEX Initial Submission, Statement of Carleton at 16-17; NYNEX Rebuttal, Statement of Carleton at 5.

[136] Pactel Initial Submission at 14-15.

[137] Consumer Coalition Proposed Findings at 16.

[138] *Id.* at 17-21.

[139] Consumer Coalition Response, Appendix to Statement of Miller at 3-7.

[140] *Id.*, *citing* Smith Barney, Harris Upham & Co., Inc., *Telecommunications/Regulated Services*, August 7, 1989.

[141] *Id.*, *citing* First Boston Corporation, *Equity Research-BellSouth*, p. 5, Sept. 16, 1989. Miller notes that this cellular growth did not include growth associated with the then-pending Lin acquisition.

[142] Consumer Coalition Proposed Findings at 18-19.

[143] BellSouth Reply Findings at 6. (emphasis in original)

[144] *Id.* at 5. BellSouth also cites similar January, 1990 *Value Line* analyses of other RHCs. The *Value Line* reports referenced by BellSouth were submitted by GSA in its responsive submission. *See* GSA Responsive Submission, Exhibit 1.

[145] *See, e.g., Max Headroom: The Baby Bells are not all alike*, Morgan Stanley, May 10, 1990, at 18, 19, 37-43; *The Cellular Telecommunications Industry*, Donaldson, Lufkin, & Jenrette, May, 1989, at 40, 52. These and other analysts' reports became part of the Rule Making record in this proceeding through discovery. *See* Appendix G.

[146] *Value Line Ratings and Reports*, p. 757, July 20, 1990.

[147] Consumer Coalition Proposed Findings at 18-19.

[148] We note in this regard that, of the analysts whose reports appear in the record, those who have the greatest expectations for cellular in the next five years tend to make growth forecasts that are a little higher than the IBES median estimate.

[149] *See* III. C., below.

[150] FPC v. Hope Natural Gas, 320 US 591, 603 (1944) (*Hope*). This standard is known as the "capital attraction" standard. *See also* Bluefield Water Works v. PSC, 262 US 679, 693 (1923) (*Bluefield*). These cases will be referred to collectively as *Bluefield/Hope*.

[151] *Hope*, 320 US at 603. This standard is known as the "comparable earnings" standard. *See also Bluefield*, 262 US at 692.

[152] Ameritech Proposed Findings at 39-40.

[153] Farmers Union Central Exchange, Inc. v. FERC, 734 F.2d 1486, 1527 (D.C.Cir. 1984), *cert. denied*, 469 US 1034 (1984) (*Farmers Union*).

[154] Ameritech Proposed Findings at 17-22.

[155] *Id.* at 18.

[156] *Id.* at 36. *See also* Ameritech Rebuttal, Phillips Statement at 6-7.

[157] Ameritech Proposed Findings at 32. Ameritech offers the following example: "If the book value of an RHCs' stock is $100, the stock would be currently trading at $180. Using a 5 percent dividend yield component and a 7 percent growth rate results in a DCF-required return of 12 percent. Applying this return to a firm's net original cost rate base of $200 results in [authorized] earnings per share of $12. After paying its $9 dividend, the firm has $3 left for growth, and $3 equates to a 3 percent growth rate." *Id.*

[158] *Id.* at 50.

[159] *Id.* at 45-47; *see* III.B., below, for discussion of Ameritech's selection of a group of comparable firms.

[160] Ameritech's Reply Proposed Findings at 18-21. The efficient market hypothesis holds that all available and relevant information about a company is incorporated into the market price of that company.

[161] *Id.* at 21.

[162] Ameritech Proposed Findings at 18 and 51; Ameritech Initial Submission at 21.

[163] Ameritech Proposed Findings at 40.

[164] *Id.* at 50-51.

[165] Consumer Coalition Proposed Findings at 21.

[166] *Id.* at 21, *citing* Permian Basin Area Rate Cases, 390 US 747, 806 (1968) (*Permian Basin*).

[167] Consumer Coalition Proposed Findings at 22, *citing* Generic Determination of Rate of Return on Common Equity for Public Utilities, Order No. 489, 53 Fed. Reg. 3342 (February 5, 1988) (*Order No. 489*), *rehg. den.*, 489-A, 53 Fed. Reg. 11,991 (April 12, 1988).

[168] Consumer Coalition states that other RHCs used data from companies with market-to-book ratios greater than one in DCF formulas. Consumer Coalition Proposed Findings at Appendix A, p.2

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.* at 3.

[173] *Id.* Consumer Coalition claims that Ameritech's "fair value" approach allows a return on the market value of the total of equity-financed assets.

[174] *Id.* at 4, *citing* Orange & Rockland Utilities, Inc., 40 FERC ¶ 63,053 (1987) (*O & R Initial Decision*), *mod. on other grounds*, 44 FERC ¶ 61,253 (1988) (*O & R Recon.*), *rehearing granted in part on other grounds*, 45 FERC ¶ 61,252 (1988).

[175] Consumer Coalition Proposed Findings at Appendix A, p. 4.

[176] *Id.* at 5, *citing* Ameritech Rebuttal, Phillips Statement at 11.

[177] American Telephone & Telegraph Co. and the Associated Bell System Companies, Charges for Interstate and Foreign Communication Service, *Interim Decision and Order*, 9 FCC 2d 20, 56 (1967).

[178] *Hope*, 320 US at 602. *See also* United States v. FCC, 707 F.2d 610, 618 (D.C. Cir. 1982) ("Under settled law, the Commission may employ any formula or combination of formulas it wishes and it is free to make pragmatic adjustments called for by particular circumstances."); Arkansas Louisiana Gas Co. v. FERC, 654 F.2d 435, 441 (5th Cir. 1981) ("It is not the law that the Commission may set a rate of return only by comparison to the actual earnings of comparable companies.*** [T]he comparable earnings and attraction of capital tests are neither exhaustive nor exclusive and . . . the Commission may set just and reasonable rates without reference to these standards.").

[179] *See e. g.*, FERC's *Order 489* ; Southwestern Bell Telephone Company's Proposal for Network Modernization, Rate Stability and Pricing Regulation, a/k/a "Telekansas", *Order*, Docket. No. 166,856-U, (February 2, 1990) (issued by the Kansas Corporation Commission) (adopting a return on equity based on the DCF methodology); Investigation of the Revenue Requirements, Rate Structures, Charges, Services, Rate of Return and Construction Program of South Central Bell Telephone Company in its Louisiana Intrastate Operations, the Appropriate Level of Access Charges, and All Matters Relevant to the Rates and Services Rendered by the Company, Order No. U-17949-A, (May 25, 1989) (issued by the Louisiana Public Service Commission) (rejecting the comparable earnings methodology).

[180] *Farmers Union*, 734 F.2d at 1496.

[181] *Id.* at 1495.

[182] *Id.* at 1496-97.

[183] *Id.* at 1525-27. The court stated: "FERC's method ensures that the allowable revenues for oil pipelines will exceed the revenues earned by its selected unregulated companies by the extent to which the pipelines' 'equity component' exceeds the portion of the rate base financed through equity investments." *Id.* at 1526.

[184] In establishing a rate of return for AT&T in 1981, the Commission stated: "[a]lthough we reject the contention that this Commission has an affirmative obligation to set an interstate rate of return which will insure a market to book ratio for AT&T's common stock which will exceed one, we do recognize that a market to book ratio of less than one may be symptomatic of deficient rates of return." American Telephone and Telegraph Co. Petition for Modification of Prescribed Rate of Return, *Decision*, 86 FCC 2d 221, 245, n.44 (1981).

[185] Ameritech asserts that the loss in value will be $78 billion. This figure is not explained, and appears to be a gross exaggeration based on the faulty assumption that all stock value lost (including value associated with intrastate and nonregulated activities) will result directly from our decision.

[186] We note that our analysis on this issues is also in accord with recent FERC decisions. *See Order No. 489*, 53 Fed. Reg. 3342 (February 5, 1988) *O & R Recon. Decision*, 44 FERC ¶ 61,253, 95 PUR4th 451 (1988). In reviewing a request to substitute the utility's book value per share for market price in the

dividend yield calculation, FERC stated: "O&R's circular approach to a rate of return determination would perpetuate whatever level of earnings is currently anticipated by investors. If expected earnings levels were depressed, as they were industry-wide during the mid-1970's, adopting O&R's approach would tend to perpetuate the low expected earnings levels and associated depressed stock prices. The cost of capital standard endorsed by this Commission avoids this self-perpetuating cycle by setting the allowed rate of return on common equity at the rate of return investors require on their investment." *O & R Recon. Decision*, 95 PUR4th at 453.

[187] As the Supreme Court noted in *Bluefield*, a rate of return that is reasonable at one time may be too high under different economic conditions. 262 US at 693.

[188] *Hope* rejected the position that a "fair value" rate base was constitutionally required. In so doing, *Hope* stated: "'fair value' is the end product of the process of rate-making not the starting point . . . [R]ates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated." *Hope*, 320 US at 601.

[189] American Telephone and Telegraph Co. and the Associated Bell System Companies: Charges for Interstate and Foreign Communication Service, 9 FCC 2d 30, 51 (1967) ("this Commission is committed to regulation on original cost rate base").

[190] AT&T (Docket 19129), 64 FCC 2d 1, 48-50 (1977).

[191] Ameritech Rebuttal (Phillips) at 11.

[192] The Supreme Court has recently accepted the proposition that most experts accept the concept of an efficient market. Basics, Inc. v. Levinson, 108 S.Ct. 978, 993 (1988).

[193] As the Supreme Court made clear in *Duquesne*, a carrier does not suffer confiscation simply because a prudent investment in plant is not included in the rate base. 109 S.Ct. at 619-620.

[194] The United States Court of Appeals for the District of Columbia Circuit recently considered our rules and policies concerning how we calculate the rate base that we use for ratemaking purposes, and affirmed those rules in most respects. *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990). At least since 1977, the FCC has followed a policy of generally allowing only "used and useful" investments to be included in the rate base. *See id.*, 911 F.2d at 779.

[195] Southwestern Bell Initial Submission at 23, Attachment 8; *id.*, Joint Affidavit of William E. Avera and Bruce H. Fairchild.

[196] Texas OPUC Notice of Appearance, Affidavit of Carol A. Szerszen; Consumer Coalition, Proposed Findings at 24, n.64.

[197] SWB Rebuttal at 3-18; SWB Supplemental Rebuttal, Affidavit of Susan B. Fox.

[198] Colorado CC Responsive Submission at 9.

[199] Florida Citizens Responsive Submission, Testimony of Clinger at 15, Schedule 2, p. 1.

[200] Indiana/Ohio CC Responsive Submissions, Direct Testimony of Ben Johnson at 30.

[201] Pennsylvania OCA Responsive Submission, Affidavit of Matthew I. Kahal at 5.

[202] Tennessee PSC Responsive Submission, Testimony of Christopher C. Klein at 24.

[203] Consumer Coalition Responsive Submission, Statement of Matityahu Marcus at 3; *id.* Statement of Ralph E. Miller at 7.

[204] US West Rebuttal, Statement of Laurence B. Siegel at 17; BellSouth Rebuttal at 5-9, 17-26, Rebuttal Statement of Willard T. Carleton; NYNEX Rebuttal, Statement of Willard T. Carleton.

[205] US West Initial Submission, Statement of Laurence B. Siegel at 23; Ameritech Initial Submission, Testimony of Charles M. Linke at 8, 14-15; USTA Cluster Group Betas - GSA Responsive Submission, Statement of Philip R. Winter at 25; USTA Initial Submission, Appendix 1, pp. viii-ix; Southwestern Bell Initial Submission, Joint Affidavit of William E. Avera and Bruce H. Fairchild at 22; Tennessee PSC Responsive Submission, Testimony of Christopher C. Klein at 27-28. Klein, however, did not offer his CAPM estimate as a final estimate of the cost of equity. Rather, he averaged it with his DCF estimates of 12.15-12.3 to produce a recommended return on equity of 12.8%. *Id.*

[206] Consumer Coalition Responsive Submission, Statement of Ralph E. Miller at 24-33; Consumer Coalition Proposed Findings at 24-32; Consumer Coalition Reply Findings at 16-18; Stocks, Bonds, Bills, and Inflation 1989 Yearbook, Ibbotson and Associates, Chicago, Il., 1989.

[207] Southwestern Bell Rebuttal, Joint Affidavit of William E. Avera and Bruce H. Fairchild at 8; NYNEX Rebuttal, Statement of John H. Cogswell at 9; US West Rebuttal, Reply Statement of Laurence B. Siegel at 29-38; Ameritech Rebuttal, Rebuttal Testimony of Charles M. Linke at 31 and Exhibit 4.

[208] Consumer Coalition Responsive Submission, Statement of Ralph E. Miller at 24-33; Proposed Findings at 30-32; Reply Findings at 16-18; NYNEX Rebuttal, Statement of John H. Cogswell at 9; US West Rebuttal, Statement Submitted by Laurence B. Siegel at 34.

[209] Bell South Initial Submission, Testimony of Carleton at 35-41; NYNEX Initial Submission, Testimony of Carleton at 22-27.

[210] Bell Atlantic Initial Submission, Affidavit of Vander Weide at 10.

[211] USTA Initial Submission, Appendix 1, p. ix.

[212] USTA Rebuttal at 5, 9. Bell South Initial Submission, Testimony of Carleton at 35; NYNEX Initial Submission, Testimony of Carleton at 22. Bell Atlantic Initial Submission, Affidavit of Vander Weide at 10.

[213] Consumer Coalition Proposed Findings at 33. Florida Citizens, Direct Testimony of Steven F. Clinger at 33; GSA, Statement of Philip R. Winter at 23; and West Virginia GA, Statement of Stephen G. Hill at 6.

[214] Ameritech Initial Submission, Testimony of Charles F. Phillips; Ameritech Rebuttal, Rebuttal Testimony of Charles F. Phillips.

[215] Indiana/Ohio CC Responsive Submission, Direct Testimony of Ben Johnson, PhD., at 11-13. Ameritech Rebuttal, Rebuttal Testimony of Charles F. Phillips, Attachment 6.

[216] Ameritech Rebuttal, Rebuttal Testimony of Charles F. Phillips at 19.

[217] US West Initial Submission, Statement of Laurence B. Siegel at 23.

[218] Consumer Coalition Proposed Findings at 37; Responsive Submissions, Statement of Ralph E. Miller at 37. US West Rebuttal at 28.

[219] Consumer Coalition Proposed Findings at 37; US West Initial Submission, Statement of Laurence B. Siegel at 22; US West Rebuttal at 30.

[220] USTA Initial Submission, Proposed Findings, Appendix 2.

[221] GSA Responsive Submission, Statement of Philip R. Winter at 24; Maryland PC Response at 5-8; Pennsylvania OCA, Affidavit of Matthew I. Kahal at 12-14.

[222] Consumer Coalition Proposed Findings at 32-39.

[223] Consumer Coalition Reply Findings at 16.

[224] Consumer Coalition Responsive Submission, Statement of Ralph E. Miller at 33-39; Bell Atlantic Initial Submission, Affidavit of James H. Vander Weide at 6-9.

[225] Bell Atlantic Rebuttal Submission, Reply Affidavit of James H. Vander Weide at 13-19.

[226] *Id.* at 17-18.

[227] Tennessee PSC, Affidavit of Christopher C. Klein at 29; Bell Atlantic Rebuttal Submission, Reply Affidavit of James H. Vander Weide at 7-9; Maryland PC Response at 4.

[228] Two methods were used to apply the criteria to select comparable firms. USTA used a modification of the clustering procedure suggested in the *Docket 87-463 Notice*. The other analyses used screening procedures similar to the one described in Part 65.400. None of the parties argued that method of selection is a critical factor in establishing the validity of a comparable firms analysis. Accordingly, we assign no preference based on the selection method.

[229] Ameritech Rebuttal, Rebuttal Testimony of Charles F. Phillips; Bell Atlantic Attachment A Update for July, 1990.

[230] Bell Atlantic Attachment A Update for July, 1990.

[231] USTA Proposed Findings, Appendix 2; Bell Atlantic, Attachment A Update, December, 1989.

[232] Indiana/Ohio Response, Testimony of Ben Johnson at 14-26; USTA Initial Submission at 9 and Appendix 1, p. ix; Ameritech Initial Submission, Testimony of Charles F. Phillips; GSA Responsive Submission, Statement of Philip R. Winter.

[233] Florida's Citizens Response, Direct Testimony of Steven F. Clinger at 7; Indiana/Ohio CC Response, Direct Testimony of Ben Johnson at 18; PacTel Initial Submission at 32.

[234] *See, e.g.*, Bell Atlantic Proposed Findings at 4; BellSouth at 14; USTA at 8-9.

[235] *Id.*

[236] Consumer Coalition Proposed Findings at 45-46.

[237] *Id.* at 45.

[238] The parties placed a wide variety of interest rate comparisons in the record. We use these particular rates for illustrative purposes only.

[239] *1986 Represcription Proceeding* at paras 34-36. In that proceeding carriers took the position that, because the Part 65 rules did not specify a risk premium methodology, Part 65 precluded the Commission from taking into consideration in any way the 1984-86 decline in interest rates. The Commission found that consideration of interest rate data was necessary to evaluate objections to the use of 2-year average data inputs in the "historical" DCF formula. *Id.* paras. 14, 34-36. *See* III.B.3., above.

[240] *See also* Part IV. A.2., below.

[241] FERC's benchmark return on equity for electric utilities for the period February 2, 1990 - April 30, 1990, calculated using a somewhat different DCF formula, was 11.75. Generic Determination of Rate of Return on Common Equity for Public Utilities, 55 Fed. Reg. 2060 (January 22, 1990).

[242] Virtually all LEC-sponsored estimates, except the bottom of the range of the risk premium estimates offered by Southwestern Bell's experts Avera and Fairchild, lie above this range. We note, however, that no LEC estimate has been rejected solely or primarily on the basis of the equity market benchmarks. Each has been considered in its own terms and on its merits; the equity market benchmark data merely confirms our conclusions about the LEC estimates.

[243] *See e.g.*, National Telecommunications and Information Administration, Comprehensive Study of the Domestic Telecommunications Infrastructure, Notice of Inquiry, January, 1990.

[244] *See* NYNEX Proposed Findings at 22-26.

[245] NYNEX Initial Submission at Appendix B, p. 3-4.

[246] *Id.* at 5.

[247] Davidson states that the U.S. is currently running a multi-billion dollar trade deficit for telecommunications equipment and services. *Id.*

[248] *Id.* at 6.

[249] *Id.* at 9. *See also* NYNEX Reply Proposed Findings at 17-22.

[250] NYNEX Rebuttal, Attachment A at 5. *See also* NYNEX Initial Submission, Appendix B, p. 9-10.

[251] NYNEX Initial Submission, Appendix B, p. 11; NYNEX Proposed Findings at 24.

[252] NYNEX Initial Submission, Appendix B, p. 11.

[253] The Telecommunications Infrastructure In Perspective, Ad Hoc Reply at Appendix I.

[254] *Id.* at 7-13.

[255] ETI notes that Singapore has the most volume of usage per access line, but that Singapore also has lower levels of penetration which partially accounts for the volume of usage per access line. *Id.* at 8.

[256] *Id.* at 8-9.

[257] ETI states: digital switches are but subset of computer-controlled switches; France has more switches which are not computer-controlled; switches which are not computer-controlled are able to access only basic services. Therefore, because the U.S. exceeds France in the percentage of lines served through computer-controlled switches, it is not falling behind in the deployment of modern technologies. *Id.* at 12-13.

[258] This dollar amount includes investment in both private and public networks. *Id.* at 36.

[259] *Id.* at 4 and 22-26. *See also* Ad Hoc Proposed Findings at 24 and 26. Ad Hoc also contends that NYNEX's investment figures showing competitors spending more per subscriber line than the U.S. are misleadingly high because they include investment associated with customer premises equipment, equipment and facilities used for long-distance communication, PBXs, and activities not regulated in the U.S. These are all equipment investments that the BOCs do not have to make. *Id.* at 22.

[260] Ad Hoc Initial Submission at Appendix I, p. 31.

[261] NYNEX Rebuttal at Attachment A, p.1.

[262] Davidson states that countries such as Sweden, Denmark, and Canada exhibited higher penetration rates than the U.S. in 1987. Morever, in 1989, France had a higher penetration rate than the U.S., and Germany and the United Kingdom had rates of pentration essentially identical to the U.S. *Id.* at 4.

[263] *Id.* at 4-5.

[264] NYNEX states that by 1994 the U.S. will trail all of its major competitor nations in the deployment of digital switching. NYNEX also maintains that the U.S. will trail a number of major competitor nations in the deployment of Signalling System 7 within the next few years. *Id.* at 2-3.

[265] *Id.* at 4-8.

[266] CIRI/WID Rebuttal, Paper of Mary G. Jones, p. 3.

[267] *Id.* at 12-14.

[268] CIRI/WID Rebuttal at 3.

[269] NYNEX Proposed Findings at 25-26.

[270] NYNEX implies that such widespread deployment increases the risk of infrastructure investment. NYNEX Proposed Findings at 26-27. USTA argues that infrastructure risk is great-

er because of the risk in making critical new investment in an increasingly competitive marketplace. USTA Reply Proposed Findings at 10.

[271] *See e.g.*, BellSouth Proposed Findings at 7; NYNEX Proposed Findings at 26-27.

[272] *See e.g.*, Pactel Proposed Findings at 28-30.

[273] *See e.g.*, NYNEX Reply Proposed Findings at 28-29.

[274] Consumer Coalition Reply Proposed Findings at 29.

[275] Consumer Coalition Proposed Findings at 51.

[276] Ad Hoc Proposed Findings at 50.

[277] *Id.* at 30.

[278] Consumer Coalition Proposed Findings at 51. The LECs contend that Consumer Coalition's position is based on a rigid and unrealistic model. *See e.g.*, BellSouth Reply Proposed Findings at 17-18.

[279] 47 U.S.C. § 151.

[280] The resulting higher rates could also, as Consumer Coalition suggests, have the perverse effect of reducing demand and profits.

[281] *1986 Represcription Proceeding*, 51 Fed. Reg. 32920 at paras. 50-51.

[282] *See e.g.*, Bell Atlantic Proposed Findings at 10-12.

[283] Rochester Proposed Findings at 14-15.

[284] NYNEX Proposed Findings at 29-30.

[285] CC Docket 87-339 established a program for monitoring the impact of Joint Board decisions. Under this program, the RHCs file reports which include information on bypass. Establishment of a Program to Monitor the Impact of Joint Board Decisions, *Order*, 2 FCC Rcd 5266 (1987), *recon.*, 4 FCC Rcd 7660 (1988).

[286] NYNEX Proposed Findings at 30, *citing* NYNEX Bypass Reports in CC Docket 87-339, filed April 29, 1988, October 31, 1988, April 28, 1989. NYNEX states that it stands behind its bypass reports as "the most reliable estimate of bypass on the public record." *Id. See also* NYNEX Rebuttal at 20.

[287] Bell Atlantic Initial Submission at Attachment 2, p. 4.

[288] *Id.* at 5.

[289] *Id.* at 6.

[290] *Id.* at 8-9.

[291] *Id.* at 10-11.

[292] *See e.g.*, Pactel Proposed Findings at 28; US West Proposed Findings at 30-31, *citing S & P report*.

[293] *See e.g.*, NYNEX Reply Proposed Findings at 31; US West Reply Proposed Findings at 13.

[294] *See e.g.*, GTE Reply Proposed Findings at 5; US West Reply Proposed Findings at 13-14.

[295] *See e.g.*, Ad Hoc Proposed Findings at 7-8.

[296] *See e.g.*, Ad Hoc Proposed Findings at 9, *citing*, Local Exchange Carriers' Individual Case Basis DS3 Service Offering, *Memorandum Opinion and Order*, 4 FCC Rcd 8634, 8643 and 8644 (1989).

[297] *See e.g.*, Ad Hoc Proposed Findings at 10-11, *citing*, Investigation of Special Access Tariffs of Local Exchange Carriers, *Order on Reconsideration*, 5 FCC Rcd 400 (1990). *See also*, Consumer Coalition Proposed Findings at 48-50.

[298] Ad Hoc Proposed Findings at 3.

[299] Consumer Coalition Reply Proposed Findings at 26.

[300] *See e.g.*, Ad Hoc Proposed Findings at 11-13; ARINC Proposed Findings at 5.

[301] Ad Hoc Proposed Findings at 13.

[302] Consumer Coalition Reply Proposed Findings at 26.

[303] *See e.g.*, Consumer Coalition Proposed Findings at 43-44; Pennsylvania OCA Reply Proposed Findings at 17.

[304] *See* Strategic Pricing Reconsideration Order, 5 FCC Rcd 400, 404 (1990).

[305] *Cite* NYNEX reply findings reiterating the value of the Joint Board maintaining Bypass reports.

[306] *Cite* petitions and complaints filed by MFS.

[307] *FPC v. Hope Natural Gas Co.*, 320 US 591, 603 (1944).

[308] *Bluefield Water Works v. PSC*, 262 U.S. 679, (1923); *Hope, supra*.

[309] *See Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C.Cir. 1984).

[310] *See, e.g., Farmers Union*, 734 F.2d at 1502; *FERC v. Penzoil Producing Co.*, 439 U.S. 508, 517 (1979).

[311] The implied return on equity is 13.2%. That is, a company with an embedded cost of debt of 8.8% and a capital structure of 44.2% debt/55.8% equity that earned 11.25% overall return on capital would have a return on equity of 13.2%. We prescribe only the overall rate of return, however.

[312] *See* para. 14, above.

[313] 836 F2d at 1393. Invocation of the concept of balancing often conjures an image of a scale, or possibly, and more negatively, a see saw, that can only achieve balance at one point. Perhaps the more appropriate visual metaphor for the balance we have in mind would be a rocking chair that can be made to tip over frontwards or backwards, but that will remain upright through a considerable part of its total range of motion.

[314] *Cf., e.g.*, Jersey Central, *supra*, at 1177 (characterizing the zone of reasonableness as bounded at one end by investor interest against confiscation and at the other by the consumer interest against exorbitant rates.) We see the range of reasonable estimates of the cost of capital that we have identified as considerably narrower than the broad zone of reasonableness described by the *Jersey Central* court. This is because our range of estimates represents the range within we feel reasonably certain of the correctness of our results, and we have tried to make it as narrow as possible.

[315] Section 65.102 (c) provides that the RHCs shall file initial rate of return submissions on February 3, 1986, and thereafter on January 3 at two year intervals. 47 C.F.R. §65.102(c). Section 65.701 (a) states that, for enforcement purposes, "interstate earnings shall be measured over a two year period to determine compliance with the maximum allowable rate of return. The review periods shall commence on January 1 in odd-numbered years and end on December 31 in even-numbered years." 47 C.F.R. §65.701(a).

[316] GSA filed a Motion to Accept its 2/06/90 Late Filed "Notice of Appearance" on February 6, 1990. Colorado CC filed a Motion to Accept its 3/16/90 Notice of Appearance on March 16, 1990. Indiana/Ohio CC filed a Motion for Leave to Intervene Late on March 28, 1990. Texas OPUC filed a Notice of Appearance requesting acceptance of its notice of appearance and its late filed affidavit and brief on April 9, 1990 (Texas OPUC Notice of Appearance).

[317] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, *Order*, 5 FCC Rcd 1812 (1990).

[318] *Id.*

[319] Texas OPUC Notice of Appearance at 1.

[320] Southwestern claims that Texas OPUC's filing is procedurally defective because: it failed to include a Motion to Accept Late Filed Pleadings; it failed to contain a filing date; and it

failed to provide a certificate of service as proof of service on parties of record. Southwestern Opposition and Motion to Strike at 2 and 3.

[321] *Id.* at 4.

[322] *Id.*

[323] These supplemental submissions were to be filed on May 21, 1990.

[324] Ameritech Motion to Accept Late Filed Pleading at 1.

[325] Consumer Coalition Motion for Leave to File Out of Time at 2.

[326] We also accept Consumer Coalition's supplemental affidavit filed on July 3, 1990. This affidavit, upon which Consumer Coalition filed a Motion for Leave to File Supplemental Affidavit, contains no information going to the merits of this proceeding, instead it offers support for the credibility of one of Consumer Coalition's expert witnesses, Dr. Matityahu Marcus. Therefore, its acceptance in the record will not prejudice any party.

[327] USTA Petition for Waiver at 1.

[328] *Id.*

[329] *See* 47 C.F.R. §65.102(b)(1) ("[i]nitial *carrier* rate of return submissions").

[330] *See* 47 C.F.R. §65.102 (a) ("The Chief, Common Carrier Bureau may require from carriers providing interstate services, and from other participants submitting rate of return submission, data or studies that are reasonably calculated to lead to a full and fair record").

[331] Moreover, we note that the language of §65.102(c)(1) uses both "initial rate of return submissions" and "initial carrier rate of return submission" in setting the filing date for these first submissions. 47 C.F.R. §65.102(c)(1). This indicates that the first submissions are not limited in participation to carriers.

[332] Section 65.105(c) requires "[s]ervice shall be made by hand on the filing date upon all prticipants who have filed a notice of appearance pursuant to § 65.100(a)(1)." 47 C.F.R. §65.105(c).

[333] BellSouth Petition for Waiver at 1-2.

[334] Section 65.106 of the Commission's rules gives parties the right to oral argument on submissions if the requisite proof of necessity is shown. A request for oral argument must b filed within seven calendar days after the filing date of the contraversial submissions. Hand service in the final round of submissions is necessary to prevent prejudice to any party who might seek oral argument thereon. *See* 47 C.F.R. §65.106.

APPENDIX A

PARTIES FILING NOTICES OF APPEARANCE IN CC DOCKET 89-624

The Ad Hoc Telecommunications Users Committee (Ad Hoc)
Aeronautical Radio, Inc. (ARINC)
ALLTEL Operating Companies (ALLTEL)
American Telephone and Telegraph Company (AT&T)
America's Carriers Telecommunication Association (ACTA)
Illinois Bell Telephone, Indiana Bell Telephone Company, Michigan Bell Telephone Company, Ohio Bell Telephone Company, Wisconsin Bell, Inc., and American Information Technologies Corporation (Ameritech)
The Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth)
Central Telephone Company (Centel)
Cincinnati Bell Telephone (CBI)
Citizens of Florida (Florida's Citizens)
Colorado Office of Consumer Counsel (Colorado CC)
Consumer Federation of America, International Communications Association, and MCI Telecommunications Corporation (Consumer Coalition)
Consumer Interest Research Institute and the World Institute on Disability (CIRI/WID)
Consumer Advocate Division of the West Virginia Public Service Commission (West Virginia CA)
Contel Corporation (Contel)
Cox Enterprises, Inc. (Cox)
General Services Administration (GSA)
GTE Service Corporation and its affiliated domestic telephone companies (GTE) Indiana Office of Utility Consumer Counselor and Ohio Office of Consumer's Counsel (Indiana/Ohio CC)
Iowa Office of Consumer Advocate (Iowa CA)
Maryland People's Counsel (Maryland PC)
National Exchange Carrier Association (NECA)
National Rural Telecom Association (NRTA)
National Telephone Cooperative Association (NTCA)
New England Telephone and Telegraph Company and New York Telephone Company (NYNEX)
New York Department of Public Service (New York DPSC)
Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
Pacific Bell and Nevada Bell (Pactel)
Pennsylvania Office of Consumer Advocate (Pennsylvania OCA)
Public Service Commission of the District of Columbia (D.C. PSC)
Puerto Rico Telephone Company (PRTC)
Rochester Telephone Corporation (Rochester)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (Southwestern)
Texas Office of Public Utility Counsel (Texas OPUC)
Teleport Communications Group (Teleport)
Tennessee Public Service Commission (Tennessee PSC)
United States Telephone Association (USTA)
United Telecommunications, Inc. (United)
US West, Inc., the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company, doing business as US WEST Communications (US West)

PARTIES FILING INITIAL SUBMISSIONS
February 16, 1990

Ameritech
Bell Atlantic
BellSouth
NYNEX
Pactel
Southwestern
USTA
US West

PARTIES FILING RESPONSES TO INITIAL SUBMISSIONS
March 27, 1990

Ad Hoc
ARINC
Centel
Colorado Consumer Counsel
Consumer Coalition
Florida's Citizens
GSA
GTE
Indiana & Ohio Consumers' Counsel
Maryland People's Counsel
NECA
NTCA
OPASTCO
Pennsylvania Office of Consumer Advocate
Rochester Telephone Corp.
SNET
Tennessee PSC
United
West Virginia Consumer Advocate

PARTIES FILING REBUTTAL SUBMISSIONS
April 17, 1990

Ameritech
Bell Atlantic
BellSouth
CIRI/WID
Contel
GTE
NYNEX
Rochester
Pactel
Southwestern Bell
USTA
US West

PARTIES FILING SUPPLEMENTAL SUBMISSIONS
May 7, 1990

Ad Hoc
ARINC
AT&T
Ameritech
BellSouth
Centel
Cincinnati Bell
Consumer Coalition
Contel
DCPSC
GTE
NYNEX
Pactel
Rochester
SNET
Southwestern Bell
United
USTA
US West

PARTIES FILING REPLIES TO SUPPLEMENTAL SUBMISSIONS
May 21, 1990

Ad Hoc
AT&T
Ameritech
Bell Atlantic
BellSouth
Centel
Consumer Coalition
GTE
NYNEX
OPASTCO
Pactel
Rochester
Southwestern
SNET
United
USTA
US West

PARTIES FILING PROPOSED FINDINGS
July 2, 1990

Ad Hoc
AT&T
Ameritech
Arinc
Bell Atlantic
BellSouth
Centel
Consumer Coalition

DCPSC
GSA
GTE
NYNEX
Pactel
Rochester
SNET
Southwestern
USTA
US West

PARTIES FILING REPLY FINDINGS
July 16, 1990

Ad Hoc
Ameritech
Bell Atlantic
BellSouth
Centel
Consumer Coalition
GSA
GTE
NYNEX
Pactel
PA OCA
Rochester
Southwestern
USTA
US West

Appendix B

Ex Parte and Other Presentations

Date	Party Filing Presentation or Other Submission	Nature of Presentation
1/10/90	USTA	Oral
1/18/90	BellSouth	Oral
1/23/90	NYNEX	Oral
1/30/90	NYNEX	Oral
2/1/90	US West	Oral
2/6/90	Bell Atlantic	Oral
3/16/90	USTA	Oral
3/22/90	NTCA	Oral
3/30/90	BellSouth	Oral
5/31/90	Bell Atlantic	Written
6/5/90	USTA	Oral
6/6/90	USTA	Oral
6/7/90	USTA	Oral
6/25/90	Metropolitan Fiber Syters	Written
7/17/90	Bell Atlantic	Oral
7/18/90	Bell Atlantic	Oral
7/19/90	Bell Atlantic	Oral
7/19/90	USTA	Oral
7/23/90	Pactel	Oral
7/25/90	Bell Atlantic	Oral
7/26/90	Southwestern	Oral
7/30/90	NYNEX	Oral
7/31/90	Bell Atlantic	Oral
7/31/90	Southwestern	Written
8/06/90	Southwestern	Written
8/08/90	Bell Atlantic	Oral
8/09/90	Bell South	Oral
8/14/90	Southwestern	Oral
8/14/90	MCI	Oral
8/23/90	Bell Atlantic	Oral
8/24/90	Bell Atlantic	Oral
8/27/90	Bell Atlantic	Oral
8/27/90	BellSouth	Oral
9/04/90	Bell Atlantic	Oral
9/05/90	Bell Atlantic	Oral
9/05/90	USTA	Oral
9/05/90	USTA	Oral
9/06/90	BellSouth	Oral
9/06/90	USTA	Oral
9/06/90	USTA	Oral
9/07/90	NYNEX	Oral
9/11/90	BellSouth	Oral
9/12/90	MCI	Oral

APPENDIX C

Part 65
Capital Structure/Cost of Debt
As of September 30, 1989

	Percent of Capitalization					Cost of Debt			
	ST Debt	LT Debt	Other Debt	Total Debt	Equity	ST Debt	LT Debt	Other Debt	Total Debt
Ameritech	3.04%	38.43%	0.00%	41.47%	58.53%	9.16%	7.89%	0.00%	7.98%
Bell Atl	7.88%	41.19%	0.67%	49.74%	50.26%	9.27%	8.47%	8.80%	8.61%
BellSouth	0.00%	38.41%	0.00%	38.41%	61.59%	0.00%	8.91%	0.00%	8.91%
NYNEX	7.34%	36.54%	0.00%	43.88%	56.12%	8.79%	8.46%	0.00%	8.52%
Pactel	1.42%	39.84%	0.00%	41.26%	58.74%	9.53%	9.36%	0.00%	9.37%
SW Bell	2.14%	39.95%	0.07%	42.16%	57.84%	9.14%	9.05%	16.27%	9.07%
US West	8.39%	44.12%	0.00%	52.51%	47.49%	9.00%	8.88%	0.00%	8.90%
Average	4.32%	39.78%	0.11%	44.21%	55.79%	7.84%	8.72%	3.58%	8.76%

Source: USTA Proposed Findings, APPENDIX 1.

AVERAGE BOC CAPITAL STRUCTURE AND DEBT COST
---- 1989 ----
($000)

	Debt			Total		Equity					
	Beg.Bal.	Ending Bal.	Average	Interest on Debt	Cost of Debt	Beg.Bal.	Ending Bal.	Average	Total Capital	Debt Ratio	Equity Ratio
	a	b	c=(a+b)/2	d	e=d/c	f	g	h=(f+g)/2	i=c+h	j=c/i	k=h/i
Illinois	1,512,067	1,437,163	1,474,615	118,859	0.080603	2,142,672	2,190,433	2,166,553	3,641,168	0.404984	0.595016
Indiana	470,049	459,460	464,755	37,499	0.080686	859,647	879,461	869,554	1,334,309	0.348311	0.651689
Michigan	1,385,132	1,399,097	1,392,115	117,188	0.084180	1,985,987	1,995,291	1,990,639	3,382,754	0.411533	0.588467
Ohio	875,234	877,498	876,366	70,104	0.079994	1,526,206	1,539,832	1,533,019	2,409,385	0.363730	0.636270
Wisconsin	514,490	533,584	524,037	41,010	0.078258	841,160	832,785	836,973	1,361,010	0.385036	0.614964
New Jersey	1,410,991	1,391,306	1,401,249	117,283	0.083699	2,399,501	2,427,901	2,413,701	3,814,950	0.367305	0.632695
Bell of PA	1,634,311	1,716,659	1,675,485	138,751	0.082812	2,321,376	2,345,261	2,333,319	4,008,804	0.417951	0.582049
Diamond State	88,710	92,671	90,691	7,671	0.084584	189,067	187,591	188,329	279,020	0.325033	0.674967
C&P - Maryland	983,092	1,018,693	1,000,893	89,774	0.089694	1,334,634	1,385,894	1,360,264	2,361,157	0.423899	0.576101
C&P - Virginia	906,314	977,360	941,837	80,461	0.085430	1,373,079	1,387,896	1,380,488	2,322,325	0.405558	0.594442
C&P - DC	242,961	244,059	243,510	20,577	0.084502	337,375	339,281	338,328	581,838	0.418519	0.581481
C&P - W. Virginia	315,322	306,604	310,963	26,520	0.085283	441,066	438,466	439,766	750,729	0.414215	0.585785
Southern Bell	3,774,078	3,954,577	3,864,328	260,884	0.067511	6,293,858	6,500,339	6,397,099	10,261,426	0.376588	0.623412
South Central	2,884,532	2,862,207	2,873,370	260,884	0.090796	4,538,435	4,687,154	4,612,795	7,486,164	0.383824	0.616176
New York	4,040,908	4,004,244	4,022,576	376,202	0.093523	5,719,506	5,598,898	5,659,202	9,681,778	0.415479	0.584521
New England	2,058,082	2,301,199	2,179,641	217,131	0.099618	2,880,010	2,931,028	2,905,519	5,085,160	0.428628	0.571372
Pacific	5,457,321	5,252,129	5,354,725	493,415	0.092146	6,992,569	7,042,550	7,017,560	12,372,285	0.432800	0.567200
Nevada	83,171	78,371	80,771	8,001	0.099058	120,075	116,803	118,439	199,210	0.405457	0.594543
Southwestern Bell	5,126,428	4,926,239	5,026,334	474,753	0.094453	7,010,344	7,060,874	7,035,609	12,061,943	0.416710	0.583290
Mountain States	2,293,916	2,247,100	2,270,508	219,831	0.096820	3,275,924	3,505,688	3,390,806	5,661,314	0.401057	0.598943
Northwestern	1,221,515	1,210,811	1,216,163	115,098	0.094640	1,849,391	1,872,350	1,860,871	3,077,034	0.395239	0.604761
Pacific Northwest	1,065,614	1,168,086	1,116,850	91,159	0.081622	1,517,829	1,511,800	1,514,815	2,631,665	0.424389	0.575611
TOTAL	38,344,238	38,459,317	38,401,778	3,383,055	0.088096	55,949,711	56,777,576	56,363,644	94,765,421	0.405230	0.594770

Sources: Col. a: 1988 Form M,Sch.B-1,Rows 420+4020+4050+4060+1407
Col. b: 1989 ARMIS 43-02,Table I,Rows 420+4020+4050+4060+1407
Col. d: 1989 ARMIS 43-02, Table II, Row 7500
Col. f: 1988 Form M, Sch.B-1, Row 440
Col. g: 1989 ARMIS 43-02, Table I, Row 440

APPENDIX D

State Rate of Return Determinations

State	Date of Order	Unadjusted Rate of Return	Adjusted Rate of Return+
Virginia*	Dec-83	10.41%	11.83%
Mississippi	Mar-84	11.99%	
Connecticut	Oct-84	12.48%	
North Carolina	Nov-84	12.51%	
South Carolina	Jan-85	12.63%	
Wyoming	Jan-85	11.91%	
New Jersey*	Apr-85	10.48%	11.20%
Arkansas	May-85	9.98%	11.72%
Kentucky*	May-85	11.80%	
Maryland	May-85	11.98%	12.15%
New Hampshire	Jun-85	12.11%	
South Dakota	Jul-85	11.90%	
D.C.	Aug-85	12.29%	
Georgia	Sep-85	12.69%	
West Virginia	Sep-85	11.50%	
New York*	Oct-85	11.85%	
Pennsylvania	Oct-85	12.38%	
Montana	Nov-85	10.94%	
Ohio	Dec-85	12.22%	
Indiana	Dec-85	10.30%	12.38%
Oklahoma	Jan-86	11.98%	
Colorado	May-86	11.67%	
Texas	Jun-86	12.03%	
Alabama*	Nov-86	11.65-12.30%	
Rhode Island*	Jul-87	11.36%	
Minnesota	Feb-88	10.64%	
Delaware*	Aug-88	10.72%	12.00%
Florida*	Oct-88	8.42-10.63%	11.51%
New Mexico	Dec-88	11.76%	
Iowa	Feb-89	10.86%	
Massachusetts	Mar-89	11.24%	
Arizona	May-89	11.68%	
Louisiana	Jun-89	10.89%	
Missouri*	Jun-89	10.73%	
Wisconsin	Jul-89	11.58%	
California*	Oct-89	11.50%	
Utah	Oct-89	10.64%	
Illinois*	Nov-89	10.77%	
Oregon	Dec-89	11.20%	
Washington*	Jan-90	10.53%	
Tennessee	Mar-90	11.60%	
Michigan*	Mar-90	9.21%	11.30%

*Price cap or incentive regulation plan in effect.
+Adjusted to reflect comparability with FCC treatment.

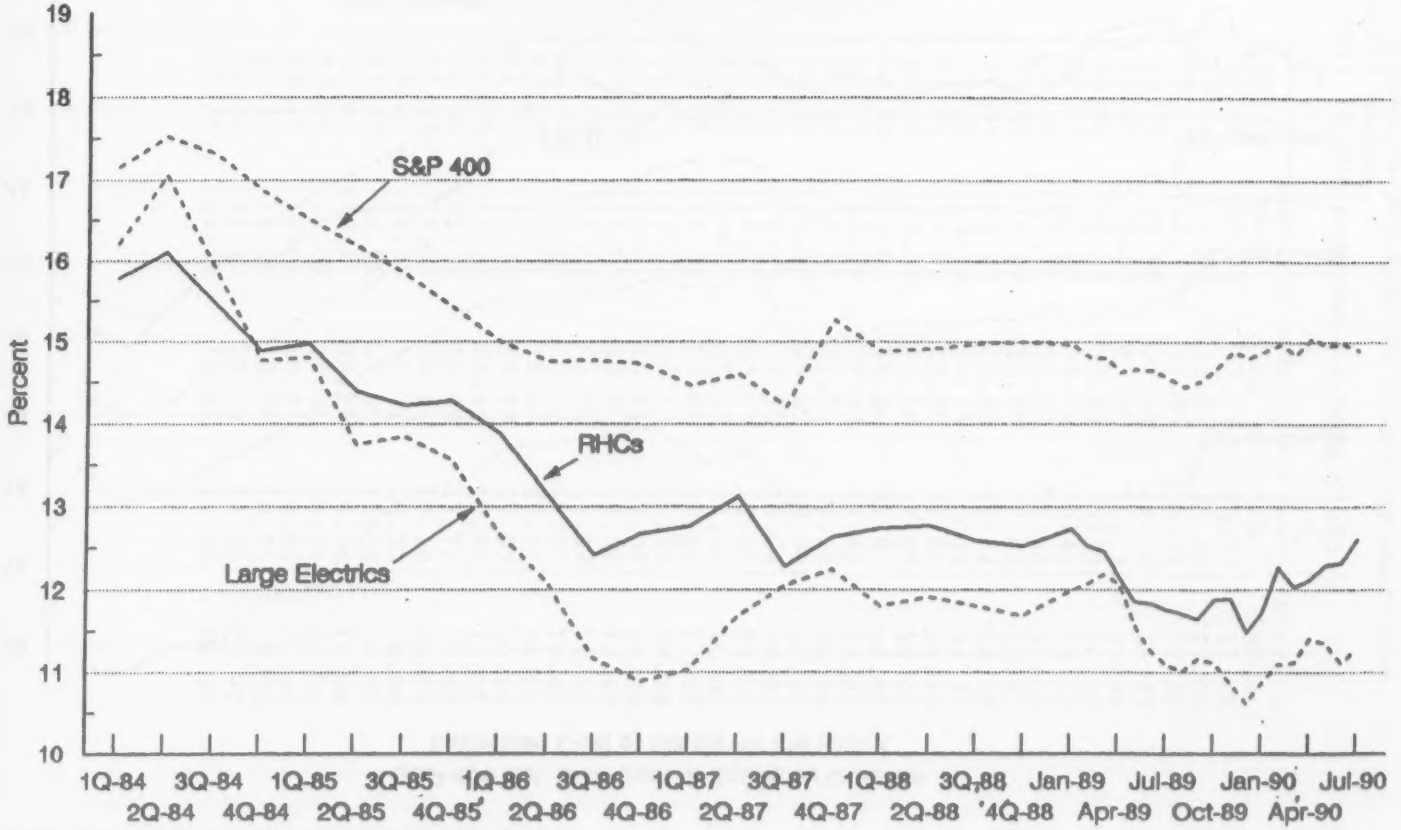
Col. g: 1989 ARMIS 43-02, Table I, Row 440

1989 and 1990 State Determined Cost of Equity

State	Date of Order	Cost of Equity
Iowa	Feb-89	12.85%
Massachusetts	Mar-89	13.00%
Louisiana	Jun-89	12.75%
Missouri*	Jun-89	12.61%
Wisconsin	Jul-89	14.00%
California*	Oct-89	12.95%
Utah	Oct-89	11.80%
Illinois*	Nov-89	12.76%
Michigan*	Mar-90	13.25%
Tennessee*	Aug-90	13.40%
	Average	12.94%

*Price cap or incentive regulation plan in effect.

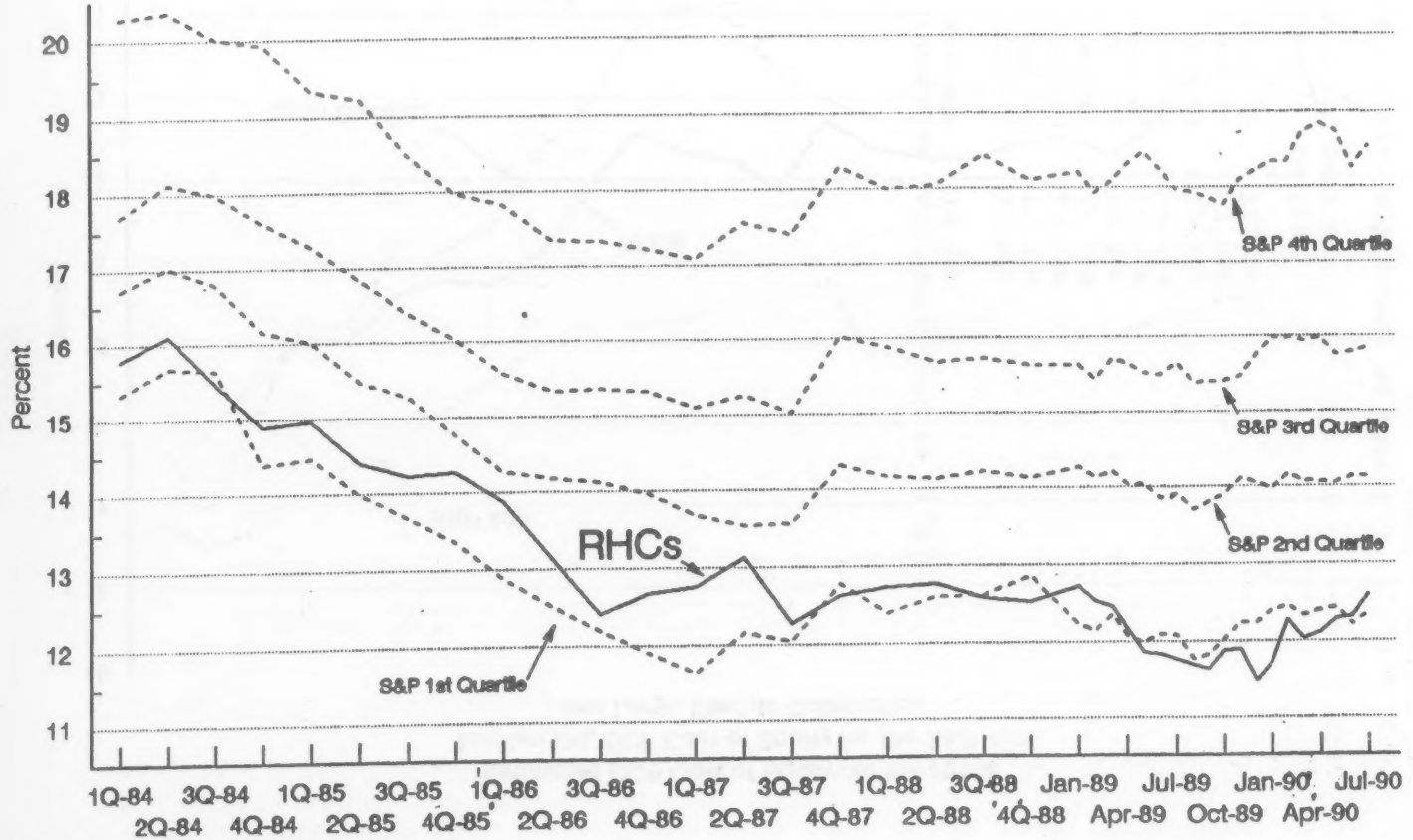
Estimated DCF Cost of Equity for the RHCs
Median Est. DCF Cost of Equity for the S&P 400
and Large Electric Companies



Note: The period 1984 through 1988 are quarterly DCFs, Jan-89 to Jul-90 are monthly DCFs.

(D:\FL\ABNDEL8P/GD8)

S&P 400 Est. DCF Cost of Equity by Quartile
Estimated Cost of Equity for the RHCs



Note: The period 1984 through 1988 are quarterly DCFs, Jan-89 to Jul-90 are monthly DCFs.

(D:\FL\ABONDS&P/GDS)

S&P 400 Estimated DCF Cost of Equity by Quartiles and Overall Median.
Lower limit is the Corporate A bond yield.

Period		Quartile Medians				Overall
Mo	Yr	1st	2nd	3rd	4th	Median
3	84	15.34	16.72	17.71	20.28	17.16
6	84	15.68	17.03	18.13	20.37	17.53
9	84	15.65	16.79	17.99	20.01	17.31
12	84	14.39	16.16	17.61	19.94	16.87
3	85	14.46	16.02	17.29	19.33	16.51
6	85	13.98	15.48	16.84	19.21	16.18
9	85	13.68	15.28	16.39	18.48	15.83
12	85	13.36	14.77	16.04	17.98	15.43
3	86	12.89	14.27	15.58	17.83	15.00
6	86	12.52	14.18	15.33	17.34	14.76
9	86	12.20	14.12	15.35	17.34	14.77
12	86	11.91	13.97	15.32	17.21	14.72
3	87	11.64	13.68	15.10	17.09	14.47
6	87	12.16	13.54	15.26	17.57	14.60
9	87	12.04	13.56	15.03	17.40	14.21
12	87	12.78	14.32	16.03	18.30	15.26
3	88	12.40	14.16	15.89	18.00	14.87
6	88	12.61	14.14	15.68	18.04	14.91
9	88	12.62	14.23	15.73	18.45	14.98
12	88	12.86	14.13	15.63	18.11	15.00
1	89	12.23	14.27	15.64	18.21	14.97
—2	89	12.14	14.13	15.44	17.94	14.81
3	89	12.35	14.21	15.71	18.08	14.80
4	89	12.05	14.02	15.65	18.31	14.63
5	89	12.00	14.04	15.52	18.47	14.66
6	89	12.09	13.85	15.50	18.25	14.65
7	89	12.08	13.91	15.65	17.97	14.56
8	89	11.77	13.70	15.39	17.93	14.45
9	89	11.82	13.81	15.41	17.86	14.51
10	89	12.04	13.92	15.42	17.77	14.67
11	89	12.24	14.11	15.47	18.10	14.88
12	89	12.24	14.05	15.77	18.22	14.80
1	90	12.40	13.96	15.98	18.33	14.87
2	90	12.46	14.17	15.98	18.34	14.96
3	90	12.33	14.07	15.95	18.74	14.84
4	90	12.39	14.06	15.98	18.85	15.04
5	90	12.43	14.05	15.76	18.75	14.95
6	90	12.21	14.13	15.80	18.26	14.97
7	90	12.36	14.13	15.86	18.53	14.90

Large Electric Companies' Median Estimated
DCF Cost of Equity.
Lower limit is the Corporate A bond yield.

Period Mo	Yr	Median
3	84	16.21
6	84	17.04
9	84	15.92
12	84	14.77
3	85	14.81
6	85	13.75
9	85	13.84
12	85	13.56
3	86	12.67
6	86	12.08
9	86	11.16
12	86	10.89
3	87	11.03
6	87	11.68
9	87	12.04
12	87	12.24
3	88	11.81
6	88	11.91
9	88	11.80
12	88	11.69
1	89	11.99
—2	89	12.06
3	89	12.17
4	89	12.07
5	89	11.58
6	89	11.28
7	89	11.09
8	89	11.01
9	89	11.16
10	89	11.11
11	89	10.87
12	89	10.62
1	90	10.86
2	90	11.09
3	90	11.12
4	90	11.40
5	90	11.35
6	90	11.11
7	90	11.26

RHCs' Average Estimated DCF Cost of Equity.

Period Mo	Yr	Average
3	84	15.78
6	84	16.10
9	84	15.48
12	84	14.89
3	85	14.97
6	85	14.39
9	85	14.22
12	85	14.27
3	86	13.89
6	86	13.13
9	86	12.42
12	86	12.67
3	87	12.76
6	87	13.12
9	87	12.27
12	87	12.63
3	88	12.74
6	88	12.77
9	88	12.59
12	88	12.52
1	89	12.73
2	89	12.52
3	89	12.46
4	89	12.15
5	89	11.86
6	89	11.84
7	89	11.76
8	89	11.70
9	89	11.64
10	89	11.88
11	89	11.89
12	89	11.48
1	90	11.71
2	90	12.27
3	90	12.03
4	90	12.11
5	90	12.29
6	90	12.32
7	90	12.60

APPENDIX F

Central Office Technology
Total Bell Operating Companies
(Summarized by Office)

Year	Total	Electromechanical Offices	% Total	Analog-Electronic Offices	% Total	Digital-Electronic Offices	% Total
1980	9,195	6,842	74.4%	2,353	25.6%	0	0.0%
1981	9,229	6,668	72.3%	2,536	27.5%	25	0.3%
1982	9,207	6,381	69.3%	2,741	29.8%	85	0.9%
1983	9,196	6,102	66.4%	2,916	31.7%	178	1.9%
1984	9,145	5,743	62.8%	3,048	33.3%	354	3.9%
1985	9,169	5,275	57.5%	3,022	33.0%	872	9.5%
1986	9,181	4,605	50.2%	2,920	31.8%	1,656	18.0%
1987	9,237	3,853	41.7%	2,820	30.5%	2,564	27.8%
1988	9,348	3,068	32.8%	2,674	28.6%	3,606	38.6%
1989	9,389	2,457	26.2%	2,493	26.6%	4,439	47.3%
1990	9,406	1,746	18.6%	2,278	24.2%	5,382	57.2%
1991	9,393	1,243	13.2%	2,124	22.6%	6,026	64.2%
1992	9,373	870	9.3%	1,989	21.2%	6,514	69.5%
1993	9,375	705	7.5%	1,866	19.9%	6,804	72.6%
1994	9,366	556	5.9%	1,736	18.5%	7,074	75.5%

Central Office Technology
Total Bell Operating Companies
(Thousands of Access Lines Served)

Year	Total	Electromechanical Lines	% Total	Analog-Electronic Lines	% Total	Digital-Electronic Lines	% Total
1980	80,234	45,039	56.1%	35,191	43.9%	4	0.0%
1981	82,709	40,809	49.3%	41,847	50.6%	53	0.1%
1982	83,716	36,954	44.1%	46,566	55.6%	196	0.2%
1983	85,924	32,763	38.1%	52,674	61.3%	488	0.6%
1984	88,546	30,180	34.1%	56,333	63.6%	2,033	2.3%
1985	91,442	25,651	28.1%	58,759	64.3%	7,033	7.7%
1986	93,863	20,053	21.4%	59,421	63.3%	14,390	15.3%
1987	96,654	14,496	15.0%	59,506	61.6%	22,653	23.4%
1988	99,524	8,972	9.0%	59,716	60.0%	30,835	31.0%
1989	102,648	5,933	5.8%	58,845	57.3%	37,870	36.9%
1990	105,844	3,345	3.2%	56,954	53.8%	45,545	43.0%
1991	109,228	2,121	1.9%	55,459	50.8%	51,647	47.3%
1992	112,476	1,301	1.2%	53,558	47.6%	57,617	51.2%
1993	115,700	1,076	0.9%	51,970	44.9%	62,654	54.2%
1994	118,961	853	0.7%	50,081	42.1%	68,028	57.2%

Note: 1980–88 Actual; 1989–94 Projected

Source: CC Docket 89–624 Initial Submision, Attachment B, Tables 1–4

Ref:Tbls1–4.wk1 Sept.14, 1990 JMA

Central Office Features
Total Bell Operating Companies
(Equipped Offices)

Year	Total	Equal Access Offices	% Total	Access to CCS-S7 Offices	% Total	ISDN Service Offices	% Total
1980	9,195	0	0.0%	0	0.0%	0	0.0%
1981	9,229	0	0.0%	0	0.0%	0	0.0%
1982	9,207	0	0.0%	0	0.0%	0	0.0%
1983	9,196	0	0.0%	0	0.0%	0	0.0%
1984	9,145	124	1.4%	0	0.0%	0	0.0%
1985	9,169	1,934	21.1%	0	0.0%	0	0.0%
1986	9,181	3,637	39.6%	0	0.0%	0	0.0%
1987	9,237	4,839	52.4%	29	0.3%	4	0.0%
1988	9,348	6,089	65.1%	435	4.7%	82	0.9%
1989	9,389	6,810	72.5%	950	10.1%	179	1.9%
1990	9,406	7,559	80.4%	2,083	22.1%	426	4.5%
1991	9,393	7,987	85.0%	3,087	32.9%	1,595	17.0%
1992	9,373	8,295	88.5%	4,101	43.8%	1,764	18.8%
1993	9,375	8,472	90.4%	4,895	52.2%	1,962	20.9%
1994	9,366	8,625	92.1%	5,362	57.2%	2,269	24.2%

Central Office Features
Total Bell Operating Companies
(Thousands of Equipped Access Lines)

Year	Total	Equal Access Lines	% Total	Access to CCS-S7 Lines	% Total	ISDN Service Lines	% Total
1980	80,234	0	0.0%	0	0.0%	0	0.0%
1981	82,709	0	0.0%	0	0.0%	0	0.0%
1982	83,716	0	0.0%	0	0.0%	0	0.0%
1983	85,924	0	0.0%	0	0.0%	0	0.0%
1984	88,546	3,528	4.0%	0	0.0%	0	0.0%
1985	91,442	46,688	51.1%	0	0.0%	0	0.0%
1986	93,863	69,957	74.5%	0	0.0%	0	0.0%
1987	96,654	81,381	84.2%	1,035	1.1%	1	0.0%
1988	99,524	91,565	92.0%	10,325	10.4%	43	0.0%
1989	102,648	97,181	94.7%	21,555	21.0%	99	0.1%
1990	105,844	102,639	97.0%	36,706	34.7%	496	0.5%
1991	109,228	106,728	97.7%	52,250	47.8%	1,059	1.0%
1992	112,476	110,548	98.3%	66,394	59.0%	1,370	1.2%
1993	115,700	114,246	98.7%	78,645	68.0%	1,888	1.6%
1994	118,961	117,778	99.0%	86,964	73.1%	2,218	1.9%

Note: 1980-88 Actual; 1989-94 Projected

Source: CC Docket 89-624 Initial Submision, Attachment B, Tables 1-4

Ref:Tbls1-4.wk1 Sept.14, 1990 JMA

Transmission Facilities – Loop and Inter–Office
Total Bell Operating Companies
(Millions of Sheath Miles)

Year	Total	Copper	Fiber	Fiber % Total
1980	2,230	2,230	0	0.0%
1981	2,276	2,275	0	0.0%
1982	2,321	2,320	1	0.1%
1983	2,351	2,348	3	0.1%
1984	2,371	2,362	8	0.3%
1985	2,392	2,372	20	0.8%
1986	2,424	2,390	34	1.4%
1987	2,453	2,407	45	1.9%
1988	2,470	2,410	60	2.4%
1989	2,504	2,425	78	3.1%
1990	2,553	2,455	98	3.8%
1991	2,603	2,484	119	4.6%
1992	2,650	2,509	141	5.3%
1993	2,696	2,534	162	6.0%
1994	2,742	2,558	185	6.7%

Note: 1980–88 Actual; 1989–94 Projected

Source: CC Docket 89–624 Initial Submission, Attachment B, Table 5a

Ref: Tbls5–8.wk1 Sept. 14, 1990 JMA

Transmission Facilities – Inter-office
Total Bell Operating Companies
Working Circuits (000s)

Year	Total Working Circuits	Baseband Working Circuits	Baseband % Total	Analog Carrier Working Circuits	Analog Carrier % Total	Digital Carrier Working Circuits	Digital Carrier % Total
1980	11,369	4,889	43.0%	1,629	14.3%	4,852	42.7%
1981	12,068	4,802	39.8%	1,324	11.0%	5,942	49.2%
1982	12,806	4,626	36.1%	1,048	8.2%	7,132	55.7%
1983	12,664	4,404	34.8%	1,011	8.0%	7,249	57.2%
1984	12,537	4,038	32.2%	661	5.3%	7,839	62.5%
1985	13,250	3,731	28.2%	571	4.3%	8,948	67.5%
1986	13,796	3,203	23.2%	499	3.6%	10,093	73.2%
1987	14,206	2,643	18.6%	410	2.9%	11,152	78.5%
1988	15,148	2,232	14.7%	249	1.6%	12,667	83.6%
1989	15,782	1,928	12.2%	168	1.1%	13,686	86.7%
1990	16,308	1,670	10.2%	142	0.9%	14,497	88.9%
1991	16,752	1,434	8.6%	126	0.8%	15,192	90.7%
1992	17,333	1,331	7.7%	108	0.6%	15,894	91.7%
1993	17,777	1,219	6.9%	94	0.5%	16,464	92.6%
1994	18,353	1,129	6.2%	148	0.8%	17,076	93.0%

Note: 1980-88 Actual; 1989-94 Projected

Source: CC Docket 89-624 Initial Submission, Attachment B, Table 5b

Ref: Tbls5-8.wk1 Sept. 14, 1990 JMA

Transmission Facilities – Inter-office
Total Bell Operating Companies
Working Carrier Spans (Links) (000s)

Year	Total	Total Analog	Analog Copper	Analog Radio	Total Digital	Digital Copper	Digital Radio	Digital Fiber
1980	1,000	344	306	38	656	637	16	3
1981	997	342	293	50	654	627	20	8
1982	1,001	310	262	48	691	642	24	25
1983	1,009	289	241	48	721	635	27	59
1984	970	195	169	26	775	635	30	111
1985	1,012	139	124	15	873	647	33	194
1986	1,118	118	94	24	1,000	682	35	283
1987	1,172	69	57	13	1,103	704	37	362
1988	1,241	49	36	14	1,192	708	36	448
1989	1,313	29	19	10	1,284	684	35	565
1990	1,341	20	12	8	1,321	625	35	661
1991	1,384	11	5	6	1,373	596	35	741
1992	1,428	8	3	5	1,420	562	36	822
1993	1,484	5	2	3	1,479	530	37	913
1994	1,535	2	1	1	1,532	498	37	997

Year	Working Spans Total	% Analog	% Digital	Digital % Total Working Spans Copper	Radio	Fiber
1980	1,000	34.4%	65.6%	63.7%	1.6%	0.3%
1981	997	34.3%	65.7%	62.9%	2.0%	0.8%
1982	1,001	31.0%	69.0%	64.1%	2.4%	2.5%
1983	1,009	28.6%	71.4%	62.9%	2.6%	5.8%
1984	970	20.1%	79.9%	65.4%	3.1%	11.4%
1985	1,012	13.7%	86.3%	63.9%	3.2%	19.1%
1986	1,118	10.6%	89.4%	61.0%	3.2%	25.3%
1987	1,172	5.9%	94.1%	60.1%	3.1%	30.9%
1988	1,241	4.0%	96.0%	57.0%	2.9%	36.1%
1989	1,313	2.2%	97.8%	52.1%	2.7%	43.0%
1990	1,341	1.5%	98.5%	46.6%	2.6%	49.3%
1991	1,384	0.8%	99.2%	43.1%	2.6%	53.6%
1992	1,428	0.5%	99.5%	39.3%	2.5%	57.6%
1993	1,484	0.3%	99.7%	35.7%	2.5%	61.5%
1994	1,535	0.2%	99.8%	32.4%	2.4%	65.0%

Note: 1980-88 Actual; 1989-94 Projected
Source: CC Docket 89-624 Initial Submission, Attachment B, Table 5b
Ref: Tbls5-8.wk1 Sept. 14, 1990 JMA

Transmission Facilities – Local Loop
Total Bell Operating Companies
Working Channels (000s)

		Copper								Fiber	
		Baseband		Analog Carrier		Digital Carrier		All Copper			
Year	Total	Working Channels	% Total	Working Channels	% Total	Working Channels	% Total	Working Channels	% Total	Working Channels	% Total
1980	91,143	90,593	99.4%	206	0.2%	336	0.4%	91,135	100.0%	0	0.0%
1981	93,987	93,309	99.3%	205	0.2%	465	0.5%	93,979	100.0%	1	0.0%
1982	95,108	94,245	99.1%	199	0.2%	645	0.7%	95,089	100.0%	12	0.0%
1983	97,780	96,601	98.8%	198	0.2%	945	1.0%	97,744	100.0%	31	0.0%
1984	101,911	100,122	98.2%	191	0.2%	1,354	1.3%	101,667	99.8%	240	0.2%
1985	104,646	102,006	97.5%	201	0.2%	1,926	1.8%	104,133	99.5%	509	0.5%
1986	106,922	102,979	96.3%	198	0.2%	2,671	2.5%	105,848	99.0%	1,072	1.0%
1987	109,601	104,538	95.4%	201	0.2%	3,383	3.1%	108,122	98.7%	1,477	1.3%
1988	112,481	106,021	94.3%	178	0.2%	3,989	3.5%	110,188	98.0%	2,291	2.0%
1989	115,708	107,721	93.1%	198	0.2%	4,638	4.0%	112,557	97.3%	3,150	2.7%
1990	119,650	109,453	91.5%	173	0.1%	5,548	4.6%	115,175	96.3%	4,475	3.7%
1991	123,456	110,975	89.9%	155	0.1%	6,330	5.1%	117,461	95.1%	5,995	4.9%
1992	127,298	112,040	88.0%	130	0.1%	7,144	5.6%	119,314	93.7%	7,973	6.3%
1993	131,327	112,757	85.9%	105	0.1%	7,951	6.1%	120,812	92.0%	10,504	8.0%
1994	135,304	113,109	83.6%	85	0.1%	8,695	6.4%	121,888	90.1%	13,424	9.9%

Transmission Facilities – Local Loop
Total Bell Operating Companies
Equipped Channels (000s)

		Copper								Fiber	
		Baseband		Analog Carrier		Digital Carrier		All Copper			
Year	Total	Equipped Channels	% Total	Equipped Channels	% Total	Equipped Channels	% Total	Working Channels	% Total	Equipped Channels	% Total
1980	136,952	136,136	99.4%	274	0.2%	537	0.4%	136,947	100.0%	0	0.0%
1981	143,175	142,156	99.3%	269	0.2%	738	0.5%	143,162	100.0%	1	0.0%
1982	148,484	146,824	98.9%	263	0.2%	1,070	0.7%	148,157	99.8%	17	0.0%
1983	153,492	151,642	98.8%	264	0.2%	1,534	1.0%	153,440	100.0%	44	0.0%
1984	158,265	155,422	98.2%	262	0.2%	2,219	1.4%	157,904	99.8%	354	0.2%
1985	162,870	158,716	97.4%	266	0.2%	3,054	1.9%	162,037	99.5%	828	0.5%
1986	166,827	161,035	96.5%	270	0.2%	3,926	2.4%	165,232	99.0%	1,591	1.0%
1987	171,052	163,529	95.6%	269	0.2%	4,996	2.9%	168,795	98.7%	2,254	1.3%
1988	175,863	166,481	94.7%	245	0.1%	5,872	3.3%	172,598	98.1%	3,263	1.9%
1989	179,947	168,593	93.7%	246	0.1%	6,720	3.7%	175,559	97.6%	4,387	2.4%
1990	184,553	170,251	92.3%	226	0.1%	8,016	4.3%	178,493	96.7%	6,059	3.3%
1991	189,062	171,504	90.7%	198	0.1%	9,110	4.8%	180,812	95.6%	8,240	4.4%
1992	193,489	171,944	88.9%	170	0.1%	10,250	5.3%	182,363	94.3%	11,124	5.7%
1993	198,226	172,318	86.9%	140	0.1%	11,263	5.7%	183,721	92.7%	14,514	7.3%
1994	203,092	172,263	84.8%	113	0.1%	12,198	6.0%	184,574	90.9%	18,527	9.1%

Note: 1980–88 Actual; 1989–94 Projected
Source: CC Docket 89–624 Initial Submission, Attachment B, Tables 6–7
Ref: Tbls5–8.wk1 Sept. 14, 1990 JMA

Transmission Facilities – Local Loop
Total Bell Operating Companies
Pairs Terminated at Main Frame
and Fiber-to-User Access Lines

Year	Pairs Terminated at Main Frame		Fiber to User
	Copper	Fiber	Access Lines
1980	142,595,297	0	50
1981	149,339,952	0	84
1982	154,923,000	108	364
1983	160,022,271	3,977	1,165
1984	163,334,255	11,991	25,221
1985	166,751,816	25,135	53,066
1986	170,035,480	45,547	101,114
1987	172,772,227	65,642	148,218
1988	175,567,662	89,179	220,620
1989	178,149,865	126,653	265,119
1990	180,041,664	181,466	296,846
1991	181,485,207	237,153	338,299
1992	182,065,422	276,029	400,706
1993	182,561,213	331,157	483,040
1994	182,660,546	392,701	612,511

Note: 1980-88 Actual; 1989-94 Projected

Source: CC Docket 89-624 Initial Submission, Attachment B, Table 8

Ref: Tbls5-8.wk1 Sept. 14, 1990 JMA

Construction Program
Total Bell Operating Companies
Gross Additions per Access Line Gained and by Category, and Average Net Book Investment per Access Line

	Access Lines		Total Gross	Gross Additions For:			Gross Additions for Growth	Average Net Book
	Total	Change	Additions	Modernization	Growth	Replacement	Per Line	Investment
Year	(000s)	(000s)	($000)	($000)	($000)	($000)	Gained	($Mil.)
1980	81,140	2,209	$16,390	$3,155	$10,312	$2,544	$4,669	$87,634
1981	83,699	2,560	$16,854	$3,228	$10,892	$2,409	$4,255	$94,944
1982	84,640	938	$15,649	$3,380	$9,904	$2,276	$10,553	$100,186
1983	86,442	2,097	$13,135	$3,196	$8,420	$1,308	$4,015	$102,002
1984	89,252	2,510	$13,271	$3,006	$7,364	$1,024	$2,934	$96,534
1985	91,847	2,632	$14,926	$3,688	$8,264	$914	$3,140	$94,862
1986	94,101	2,233	$14,497	$3,592	$7,984	$966	$3,576	$96,095
1987	96,859	2,727	$14,148	$3,605	$8,188	$890	$3,002	$96,536
1988	99,613	2,744	$13,976	$3,463	$8,443	$907	$3,077	$97,449
1989	102,531	2,922	$13,798	$3,226	$8,191	$1,250	$2,803	$98,242
1990	105,816	3,290	$14,334	$3,373	$8,246	$1,283	$2,506	$99,900
1991	109,132	3,328	$14,108	$3,417	$8,253	$1,161	$2,480	$100,393
1992	112,338	3,208	$14,123	$3,216	$8,469	$1,113	$2,640	$101,321
1993	115,679	3,340	$14,055	$3,091	$8,468	$1,117	$2,535	$102,029
1994	119,100	3,421	$14,171	$3,097	$8,572	$1,110	$2,506	$102,554

Note: 1980–88 Actual; 1989–94 Projected
Source: CC Docket 89–624 Inital Submission, Attachment B, Table 9
Ref: Tbl9.wk1 Sept.26, 1990 JMA

Sources and Uses of Funds
Total Bell Operating Companies
(Millions of Dollars)

	Funds from Operations						Funds from Investment Activities			Funds from Financing Operations				
										Change in				
Year	Net Income	Depreciation	Deferred Income Taxes	Investment Tax Credit	Allowance For Funds Used During Construction	Sub-Total	Gross Plant Additions	Change in Affiliate Investment	Sub-Total	Advances to Affiliates	Funded Debt	Equity	Dividends	Sub-total
1970	1,815	2,327	72	21	(99)	4,107	6,561	0	6,561	67	2,712	999	(1,214)	2,232
1971	1,913	2,550	260	50	(139)	4,595	6,703	0	6,703	55	2,131	1,738	(1,292)	2,226
1972	2,210	2,807	436	210	(143)	5,477	7,643	0	7,643	(139)	2,398	1,748	(1,413)	2,133
1973	2,543	3,084	875	222	(159)	6,523	8,592	0	8,592	(116)	2,374	1,911	(1,541)	2,053
1974	2,769	3,428	1,193	245	(160)	7,425	9,298	0	9,298	(188)	2,847	1,539	(1,724)	1,839
1975	2,931	3,812	1,324	641	(144)	8,507	8,849	(64)	8,785	215	1,668	1,406	(1,825)	780
1976	3,502	4,172	1,418	661	(129)	9,562	9,583	0	9,583	(197)	1,148	1,517	(1,995)	(283)
1977	3,992	4,719	1,564	723	(144)	10,784	10,882	0	10,882	(30)	1,387	1,650	(2,240)	(81)
1978	4,512	5,203	1,535	616	(166)	11,619	12,884	0	12,884	104	2,488	1,734	(2,465)	894
1979	4,863	5,747	1,640	744	(123)	12,803	14,942	0	14,942	59	3,216	2,601	(2,750)	2,048
1980	5,099	6,646	1,687	921	(169)	14,117	16,098	0	16,098	42	4,551	2,139	(2,943)	2,579
1981	5,790	7,428	1,836	935	(211)	15,744	16,590	0	16,590	(61)	1,822	3,969	(3,324)	1,076
1982	6,697	8,238	2,638	474	(210)	17,779	15,336	175	15,511	987	(396)	1,266	(3,876)	(3,521)
1983	7,097	9,145	2,180	375	(212)	18,493	12,762	0	12,762	661	234	82	(4,674)	(5,274)
1984	6,910	8,581	2,243	398	(193)	17,834	12,865	91	12,956	(397)	1,114	299	(3,910)	(4,597)
1985	7,507	9,965	2,067	520	(218)	19,731	14,491	61	14,552	711	(242)	396	(4,795)	(5,621)
1986	8,252	11,265	2,024	(139)	(197)	21,123	14,197	138	14,335	107	(1,465)	193	(5,205)	(8,210)
1987	8,382	12,919	621	(572)	(190)	21,108	13,874	10	13,883	(251)	1,068	205	(5,508)	(6,493)
1988	8,684	13,426	(183)	(606)	(162)	21,128	13,731	14	13,745	284	(385)	531	(5,580)	(7,167)
1989	7,926	13,455	128	(633)	(135)	20,715	13,420	108	13,529	93	(283)	307	(5,793)	(7,563)
1990		13,473	(145)	(562)	(136)		14,154							
1991		13,640	(390)	(525)	(134)		13,942							
1992		13,648	(213)	(494)	(136)		13,956							
1993		14,057	(226)	(435)	(134)		13,880							
1994		14,498	(326)	(405)	(136)		13,995							

Note: 1970–89 Actual; 1990–94 Projected
Source: CC Docket 89–624 Initial Submission, Attachment B, Table 10
Ref: Tbl10.wk1 Sept. 26, 1990 JMA

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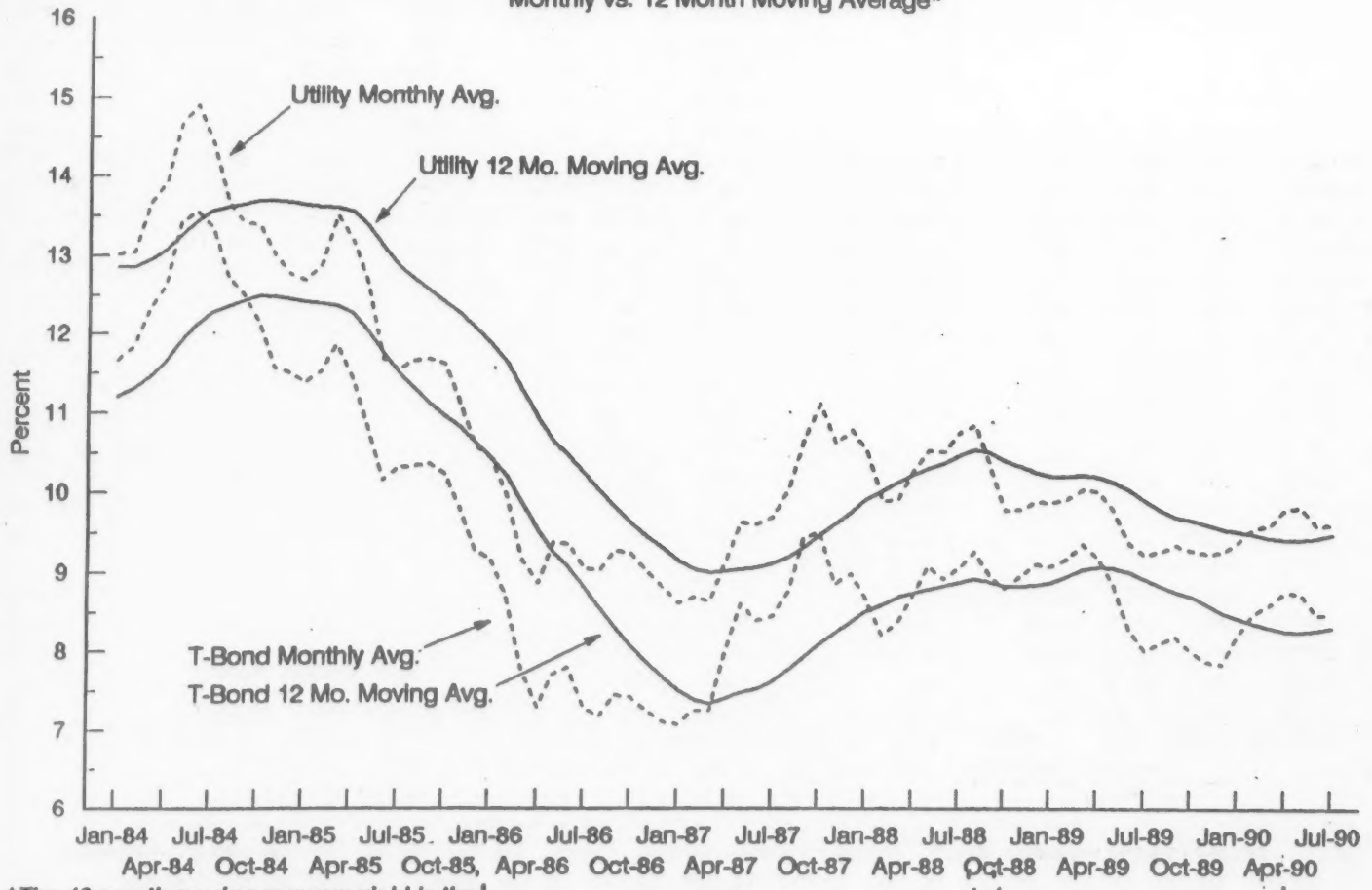
10 Year Treasury and Public Utility Aa Bond Yields

Note: 1970-89 Actual, 1990-94 Projected
Source: CC Docket 89-624 Initial Submission, Attachment B, Table 10
Ref: Tbl10.wk1 Sept. 26, 1990 JMA

10 Year Treasury and Public Utility Aa Bond Yields
Monthly vs. 12 Month Moving Average*



**The 12 month moving average yield is the average of month's yield and the preceeding 11 months' yields.*

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